GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF CABLE TELEVISION AND TELECOMMUNICATIONS
3007 TILDEN STREET, POD P, WASHINGTON, D.C. 20008

RATE ORDER REGARDING RATES FOR BASIC SERVICE OF COMCAST CABLEVISION OF THE DISTRICT, LLC FOR THE PERIOD COMMENCING ON JUNE 2004 THROUGH MAY 2005

March 11, 2005

WHEREAS, the Office of Cable Television and Telecommunications of the District of Columbia (the "Office") became certified to regulate basic cable service rates and associated charges as of October 1, 1993, and has followed applicable regulations prescribed by the Federal Communications Commission ("FCC") for the regulation of the basic service tier (the "FCC Rules" as such rules have been amended from time to time);

WHEREAS, since 1994 the Office has issued rate orders with respect to the rates that Comcast Cablevision of the District, LLC (the "Company") and its predecessors may charge for basic service;

WHEREAS, on March 11, 2004, the Company submitted an FCC Form 1240, ("Rate Filing"), to the Office to update rates charged for basic service for the period June 2004 through May 2005;

WHEREAS, the Rate Filing has been placed in the public file and has been made available for public inspection; and

WHEREAS, the Office reviewed the Rate Filing and concluded that the Company's maximum permitted basic service rate appeared to be reasonable under the FCC Rules.

NOW, THEREFORE, IT IS ORDERED THAT:

1. As of June 2004 (the effective date of the Rate Filings), the approved rate per month (excluding franchise fees) for basic service, as adjusted by Comcast on November 1, 2004, to be effective January 1, 2005 is as follows:

	Maximum Permitted Rates Per Month (excluding Franchise Fees) [1]	Actual Rates Per Month
Basic service rate	$15.11	$13.63

2. The Company may not increase the rates for basic service, equipment or installation listed in Ordering Clause No. 1, nor may the Company institute new charges for other types of services associated with basic service which is not listed in said Ordering Clause, without first complying with applicable law or regulation, including the FCC Rules.

3. The rate card published by the Company and made available to subscribers shall at all times contain all rates, terms and conditions actually in effect for basic service, provided that the Company may have short-term promotions and discounts as permitted by applicable law.

4. The Office reserves the right to modify this Rate Order if, at any time, it determines that information the Company provided to the Office is incorrect in any material manner.

5. The Office shall mail a copy of this Rate Order to the Company[2], provide appropriate public notice of this Order, and make a copy of this Order available to any person upon request.

6. This Rate Order shall become effective this 11th day of March 2005.

DISTRICT OF COLUMBIA
OFFICE OF CABLE TELEVISION AND TELECOMMUNICATIONS

By _____
James D. Brown, Jr.
Executive Director

[1] The basic service rate excludes franchise fees but includes FCC regulatory fees.

[2] A draft copy of this Rate Order was provided to the Company on February 25, 2005.

MAR 1 1 2005

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

Certification of Filling a Vacancy
In Advisory Neighborhood Commission

Pursuant to D.C. Code section §1-309.06 (d)(6)(G) and the resolution transmitted to the District of Columbia Board of Elections and Ethics ("Board") from the affected Advisory Neighborhood Commission, the Board hereby certifies that a vacancy has been filled in the following single member district by the individual listed below:

Horace Kreitzman
Single Member District 3B04

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Human Services

PUBLIC NOTICE OF FUNDING AVAILABILITY

The District of Columbia Department of Human Services (DHS), Office of Early Childhood Development (OECD) seeks to provide grants to organizations capable of providing services in the following areas:

(1) Telephone Hotline Support Services to Latchkey Children;
(2) Out-of-School Time Services to Children from Limited English Proficient Asian and African Newcomer Communities;
(3) A Child Development Center located in Ward 7 or Ward 8 to provide services to children of homeless teen parents;
(4) 24 classrooms for pre-kindergarten children;
(5) Continuous Quality Improvement, Accreditation Facilitation and Tiered Rate Reimbursement System "*Going for the Gold*!" application and selection process for child development homes and centers.

The total amount of funds available for all grants is $5,056,000. The grant awards shall be for a period of one year from the date of the award. Option years are available for Areas 1, 4 and 5. Other areas will depend on the availability of funds. A separate grant application is required for each grant area. Funding levels for each grant are as follows:

1. **Telephone Hotline Support Services for Latchkey Children Ages Five Years and Up**

   DHS/OECD seeks to fund a maximum of one grant award up to $100,000. The funds are made available through the Child Care and Development Fund (CCDF) from the U.S. Department of Health and Human Services.

2. **Out-of-School Time Services for Children from Limited English Proficient Asian and African Newcomer Community**

   DHS/OECD seeks to fund at least three (3) grant awards. A total of $500,000 is available for this purpose. The funds are made available through the Temporary Assistance to Needy Families (TANF) from the U.S. Department of Health and Human Services.

3. **A Child Development Center Located in Ward 7 or Ward 8 to Provide Services to Children of Homeless Teen Parents**

   DHS/OECD seeks to fund a maximum of one grant award up to $200,000. The funds are made available through local funds.

4. **24 Classrooms for Pre-Kindergarten Children**

DHS/OECD seeks to fund multiple grant awards. Under this initiative, a maximum of $3,456,000 is available for this purpose. Each grant award will be based on number of children served for a maximum of 16 children per classroom in each of the 24 classrooms. OECD will fund $9,000 per child for a year or $144,000 per classroom for a year. The funds are made available through local funds.

5. **Continuous Quality Improvement, Accreditation Facilitation, and Tiered Rate Reimbursement System "*Going for the Gold!*" Application and Selection Process for Child Development Homes and Centers**

DHS/OECD seeks to fund one grant award for a total of $ 400,000 each year for two (2) years. The funds are made available through Temporary Assistance to Needy Families (TANF) from the U.S. Department of Health and Human Services.

The Request for Application will be available on Monday, March 14, 2005. Applications may be obtained from the Office of Partnerships and Grants Development website at www.opgd.dc.gov, District Grants Clearinghouse or the DHS Office of Grants Management at 64 New York Avenue, N.E., Sixth Floor, Washington, DC 20002.

The Pre-Application Conference will be held on Thursday, March 24, 2005, at the DHS Office of Early Childhood Development (OECD), 717 14th Street, N.W., 8th Floor Conference Room, Washington, DC 20005, from 9:00 AM to 11:00 AM for Program Areas 1, 2 and 3; from 11:30 AM to 1:30 PM for Program Area 4; and from 2:30 PM to 4:30 PM for Program Area 5. For preparation purposes, interested parties planning to attend are requested to R.S.V.P. to Priscilla L. Burnett, Program Assistant at (202) 671-4407 or via e-mail to priscilla.burnett@dc.gov.

The deadline for application submission is April 29, 2005, 3:30 PM.

MAR 1 1 2005

Ideal Academy Public Charter School

REQUEST FOR PROPOSAL (RFP)

Provide complete turn-key design and construction services for build-out of approximately 42,000 SF charter school within existing one story warehouse facility located in Washington, DC. Program includes complete interior fit-out of Pre-School thru 8 classrooms, multi-purpose room, kitchen, administrative offices, library, computer lab, new shell building HVAC systems, new shell building electrical service and distribution systems, and new shell restrooms. Exterior building work includes creating new public entrance/image to school, limited building façade upgrades/repairs, new windows, new doors, and playground area. Services to be provided include, but are not limited to, the following:

Architectural Design
Furniture Selection
Mechanical Engineering
Electrical Engineering/Plumbing Engineering
Civil Engineering/Structural Engineering
Traffic and Parking Consultation
Kitchen Design Consultant
Project Management
Construction
Structured Voice/Data Design and Implementation
Security Design and Implementation
Move Relocation/Coordination Services
Cable Plant Distribution/ MDF Build-out and IDF Build-out

Qualified RFP response shall provide name of each proposed firm and/or consultant, resumes of firms and individuals, relevant experience on similar projects, and fee structure for each discipline outlined above. RFP response shall include an over-all project schedule.

Sealed RFP responses are sent to:

ZUELLA EVANS
100 PEABODY STREET, NW
2nd Floor
WASHINGTON, DC 20011

no later than 1:00 pm EST on March 21, 2005. E-mail and fax bid responses will be considered non-responsive and will be rejected. Questions related to the RFP shall be directed to **George H. Rutherford II, Ph.D.** at the above address. All questions shall be submitted in writing. The cut-off date for the submission of questions is 5:00 pm EST on March 16, 2005.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 872,	PERB Case No. 00-U-12
Complainant,	Opinion No. 702
	FOR PUBLICATION
v.	
DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,	
Respondent.	

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, Local 872[1] ("Complainant", "AFGE" or "Union") alleging that the District of Columbia Water and Sewer Authority ("Respondent", "WASA" or "Agency") violated D.C. Code §1-617.04 (a)(1) and (5) (2001 ed.). Specifically, AFGE alleges that WASA committed an unfair labor practice by failing to bargain, upon request, over the impact and effects of its decision to implement a Reorganization.[2]

[1]AFGE, Local 872, represents all non-professional employees employed by the District of Columbia Water and Sewer Authority, including individuals in the Bureau of Water Measurement and Billing and the Bureau of Water Services.

[2]A brief description of the facts in this case follows: In August 1999, Jocelyn Johnson, who was then AFGE's President, learned of an upcoming proposed reorganization from a high level management official who told her to keep the information confidential. On August 25, 1999, Ms. Johnson sent an e-mail to Stephen Cook, WASA's Director of Labor Relations, requesting bargaining over the impact and effects of any planned reorganization. On August 26, 1999, she sent a letter to Mr. Cook reiterating her request to bargain over the reorganization. Mr. Cook

(continued...)

The Respondent denies the allegation. Specifically, the Respondent claims that the request to bargain was prematurely made since the decision to reorganize was not final when the Union first made its request. WASA relies on the Board's precedent in Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department (FOP v. MPD) to support its position. 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (1999). In FOP v. MPD[3], the Board held that there is no duty to bargain over the impact and effects of a management right decision unless and until the decision is made. Id. WASA also claims that the Union had a duty to make another request once they received official notice that the reorganization would definitely take place. WASA relies on FOP v. MPD to support this point.[4] Id. Furthermore, WASA claims that the Union waived its right to bargain over the issue by failing to make the second request once it was notified of the Agency's final decision to reorganize. Finally, WASA asserts that it met its bargaining obligation because it met with employees concerning the decision prior to its implementation.

A hearing was held, and the Hearing Examiner issued a Report and Recommendation (Report). In her Report, the Hearing Examiner found that WASA violated the Comprehensive Merit

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[2](...continued)
responded to Ms. Johnson and denied having any knowledge of any reorganization. On October 15, 1999, the Union was given notice that a reorganization would take place and would become effective on November 1, 1999. The letter which notified employees of the change indicated that management had been considering the reorganization for several months. Mr. Cook admitted later that he drafted that particular letter.

[3]In FOP v. MPD, FOP filed an unfair labor practice complaint against MPD alleging that MPD refused to bargain over the impact and effects of proposed changes in the police officers' "days off and watch" schedule. 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (1999). MPD proposed the change, but later decided not to implement the change. Id. The Board held that where an employer decides not to implement or suspends implementation of a management right decision, no duty to bargain over its impact and effects exists. Id. Under the facts of FOP v. MPD, the Board found that it was premature to conclude that MPD had violated the CMPA by failing to bargain over a proposed, but unimplemented schedule change. Id.

[4]In FOP v. MPD, the Board also observed that "in the interest of advancing the collective bargaining process, the better approach, upon being faced with [such] an effective refusal to bargain over any aspect of management's decision, is [for the union] to then make a second request to bargain with respect to the specific effects and impact of the management decision." 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (1999). However, the Board qualified that statement by indicating that "a second request to bargain is not required to establish a violation of the CMPA." Id at p. 4.

Personnel Act (CMPA) by failing to bargain over the impact and effects of the reorganization.[5] Specifically, the Hearing Examiner found that AFGE's request to bargain was both timely and specific.[6] In addition, she credited Jocelyn Johnson's testimony that she persisted with her request to bargain, even after official notice of the reorganization was sent to employees. The Hearing Examiner made her finding that the request was timely and specific, notwithstanding the fact that Ms. Johnson failed to send another written request. Furthermore, the Hearing Examiner found that "in addition to the statutory obligation to bargain over the impact and effects of management's decision, the parties' collective bargaining agreement is clear and unambiguous with regard to the parties' obligations." (Report at p. 10). The Hearing Examiner noted that WASA complied with two of the requirements for implementing a management right pursuant to Article 4 §B of the parties' collective bargaining agreement. However, the Hearing Examiner noted that WASA failed to meet the final requirement, by bargaining over the decision, upon request.[7] In response to WASA's argument that the Union waived its right to bargain by not making a second request to bargain once the notice was sent out to employees, the Hearing Examiner concluded that the absence of such a request does not constitute a waiver of the earlier bargaining demand. Furthermore, she stated that in the absence of a clear and unmistakable waiver, or an express retraction of a previous request to bargain, there is no support for the position that management had no obligation to engage in impact bargaining. See, Department of Health and Human Services, Social Security Administration, 31 FLRA No. 39 (1988). Based on the foregoing, the Hearing Examiner concluded that the Respondent violated D.C. Code §1-617.04(a)(1) and (5) (2001 ed.) of the CMPA by its failure and refusal to bargain with the Complainant.

WASA filed Exceptions to the Hearing Examiner's Report and AFGE filed an Opposition. In it's Exceptions, WASA contends that the Hearing Examiner erred in finding that WASA refused

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[5] First, the Hearing Examiner stated that it is well settled that management has certain statutory rights that it may exercise at its discretion. However, it is also well settled that management must bargain, upon request, over the impact and effects of its decisions pursuant to these reserved rights. To support this position, the Hearing Examiner relied on the Board's precedent in American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority, 47 DCR 7203,7206, Slip Op. No. 630, PERB Case No. 00-U-19 (2000).

[6] The Hearing Examiner noted that the August 26, 1999 letter from Johnson to Cook met both requirements. (R & R at 9).

[7] Article 4 §B of the parties' collective bargaining agreement, entitled "Impact of the Exercise of Management's Rights", sets forth three requirements that management must meet prior to implementing a management right decision. Specifically, management must: (1) give notice to the Union leadership concerning the proposed change; (2) provide information which was relied on to propose the change; and (3) negotiate concerning the change, upon request, as appropriate.

to bargain in good faith with the Union. The Agency reiterates its argument that AFGE did not make a timely and specific request to bargain. Furthermore, WASA argues that there is no duty to bargain over a proposed, but unimplemented management right decision and cites American Federation of Government Employees, Local 383 v. D.C. Department of Human Services to support that position. 49 DCR 770, Slip Op. No. 418, PERB Case No. 94-U-09 (2002). Finally, the Agency reiterates its argument that the Union should have made a second request to bargain. By contrast, AFGE's Opposition basically agrees with the Hearing Examiner's findings and asserts that WASA improperly raised arguments in its Exceptions that were not raised during the proceedings or in its post-hearing brief. AFGE's Opposition also repeated arguments that it made during the proceedings.

After reviewing the record in the present case, we find that the Hearing Examiner's findings are reasonable and supported by the record. The Board's precedent is clear that an Employer violates the duty to bargain in good faith by refusing to bargain over the impact and effects of a management rights decision upon request. The Hearing Examiner found that the facts demonstrate that the Union requested to bargain over the Agency's decision to implement a reorganization, and the Agency acknowledged that no such bargaining took place, even though they contend that they met with the employees to get their input. These facts, taken together with the Hearing Examiner's findings that the Board's case law requires such bargaining, make it reasonable to conclude that the Agency refused to bargain collectively in good faith with the exclusive representative, thereby committing an unfair labor practice in violation of §1-617.04 (a)(1) and (5) (2001 ed.) of the CMPA.

Additional review of the record reveals that the Agency's Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where the findings are fully supported by the record. American Federation of Government Employees 874 v. D.C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). The Board has also rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. American Federation of Government Employees, Local 2741 v. D. C. Department of Recreation Parks, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999). On this basis, we conclude that the Agency's Exceptions lack merit. Therefore, we adopt the Hearing Examiner's finding that WASA committed an unfair labor practice by: (1) violating the duty to bargain in good faith; and (2) refusing to bargain concerning its reorganization.

Since we have adopted the Hearing Examiner's finding that WASA violated the CMPA, we now turn to the issue of what is the appropriate remedy. As relief, AFGE seeks an order requiring that WASA: (1) immediately begin bargaining with the Union concerning the impact and effects of the reorganization on the 29 transferred employees and on the other employees now in the

Department of Water Services[8] and; (2) reimburse AFGE for all costs incurred in filing this Complaint. (Complaint at p.3).

As a remedy for WASA's unfair labor practice, the Hearing Examiner recommended that the Board issue an order directing the Respondent to bargain over the impact and effects of its decision to reorganize, and to grant any other relief that the Board deems appropriate.

When a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. AFSCME, Local 2401 and Neal v. D.C. Department of Human Services, 48 DCR 3207, Slip Op. No. 644, and PERB Case No. 98-U-05 (2001); D.C. Code §§ 1-605.02(3) and 1-617.13 (a) (2001 ed.). Moreover, the overriding purpose of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations. Id.

We believe that the Hearing Examiner's recommended relief is reasonable and consistent with the mandates of the CMPA. Therefore, we adopt her recommendation that the parties be directed to engage in impact and effects bargaining.

In ordering that the parties bargain over the impact and effects of the reorganization, the Board recognizes that the passage of time may have rendered some of the issues concerning the reorganization *moot*. Nevertheless, we believe that ordering the parties to bargain over issues which are still *ripe* or relevant is appropriate.

Finally, by directing that the parties bargain over the impact and effects of the reorganization, we want to make it clear that we are not ordering that WASA reverse its decision to reorganize. The Board recognizes that WASA has the right to reorganize pursuant to D.C. Code §1-617.08 (2001 ed.). Therefore, we are *not*, by this decision, seeking to reverse management's decision to reorganize.[9] To the contrary, the reorganization stands.

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[8]In its post-hearing brief, AFGE elaborates on its requested relief by stating that the Board "should direct WASA to bargain over the impact and effects of the reorganization *and to implement any resulting agreement both prospectively and, if appropriate, retroactively.*" (AFGE's Brief at p. 11).

[9]Reversing WASA's decision to reorganize would be tantamount to granting *status quo ante* relief. The Board has held that *status quo ante* relief is generally inappropriate to redress a refusal to bargain over impact and effects. Furthermore, the Board has determined that *status quo ante* relief is not appropriate when the: (1) rescission of the management decision would disrupt or impair the agency's operation; and (2) there is no evidence that the results of such bargaining would negate a management rights decision. FOP v. MPD, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). In the present case, we find that *status quo ante* relief is not

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Additionally, the Board directs that WASA post a notice indicating that it has committed an unfair labor practice by the actions described in this Opinion.

On the issue of costs, the Board has found that the awarding of costs is appropriate where: (1) the losing party's claim or position was wholly without merit; (2) the successfully challenged action was undertaken in bad faith; and (3) a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative. See, AFSCME, District Council 20, Local 2776 v. D.C. Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245 at p. 5, PERB Case No. 89-U-02 (1990). The Hearing Examiner did not recommend that the Board award costs in this matter. We adopt the Hearing Examiner's recommendation on this issue.

Pursuant to D.C. Code §1-605.02(3) (2001 ed.) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and for the reasons discussed above, we adopt the Hearing Examiner's findings and recommended remedy, with the addition noted above.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Water and Sewer Authority (WASA), its agents and representatives shall cease and desist from violating D.C. Code §1-617.04 (a)(1) and (5) (2001 ed.), by refusing to bargain on request concerning the impact and effects of its decision to implement a reorganization.

2. The Board directs the parties to commence bargaining over the impact and effects of any issues that are still ripe or relevant to the above mentioned reorganization within (30) days of the issuance of this Opinion.

3. WASA shall post conspicuously within ten (10) days from the service of this Opinion the

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[9](...continued)
appropriate. The Board finds that returning the workers to the positions that they were in prior to the reorganization after a significant lapse of time would be disruptive to WASA's operations. Furthermore, we find that there is no evidence in this case that the results of further bargaining would negate WASA's decision to reorganize.

attached Notice where notices are normally posted. The Notice shall remain posted for thirty (30) consecutive days.

4. WASA shall notify the Public Employee Relations Board (PERB), in writing, within fourteen (14) days from the date of this Order that the Notice has been posted.

5. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

March 14, 2003

DISTRICT OF COLUMBIA REGISTER

MAR 1 1 2005

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
CYNTHIA ALLEN-LEWIS, DIEDRE LAWSON, MARIA DYSON, SYLVIA JEFFERSON, LOUISE MIMS, BEATRICE MOSELY, KELLY PEELER and GREGORY WOODS, Complainants,	PERB Case No. 99-U-24 Opinion No. 703 **FOR PUBLICATION**
v.	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, Local 2401, and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES D.C. COUNCIL 20, Respondents.	

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by Cynthia Allen-Lewis and seven (7) other Grievants[1] (" Complainants" or "Grievants") against the American Federation of State, County and Municipal Employees, Local 2401 (" Respondent", "Council 20" or "Union") and the American Federation of State, County and Municipal Employees, D.C. Council 20 ("Respondent", "Local 2401" or "Union"). Specifically, the Grievants allege that Local 2401 and Council 20

[1]The Grievants were employed by the District of Columbia Child and Family Services Agency as social service assistants, social workers and secretaries. One Grievant, Beatrice Mosely, withdrew as a party prior to the hearing. (R & R at pgs.1 and 5). Evidence in the record suggests that Ms. Mosely did not pursue her claim because she was a supervisor at the time that these grievances arose and; therefore, was not entitled to bargaining unit representation. (Union's Brief at pg. 1, footnote 1).

(hereinafter referred to as "the Unions[2]") violated their duty of fair representation pursuant to D.C. Code §1-617.04(b)(1), by failing to timely process and advance their grievances to arbitration.[3]

In their complaint, the Complainants argue that the Unions violated their duty of fair representation in several ways. The Grievants assert, *inter alia*, that: (1) the Unions' level of assistance was inadequate; (2) there was no communication concerning the status of their grievances; (3) the Unions did not address all issues contained in their grievances; and (4) the Unions did not respond to the Grievants' requests and file individual grievances until the Grievants hired a private attorney to represent them.[4] Additionally, the Grievants claim that the Unions handled their grievances in a perfunctory manner. Finally, the Grievants claim that Council 20's decision not to pursue arbitration for their individual grievances was not rational.

The Respondents deny the allegations. Specifically, the Respondents claim that they did not commit an unfair labor practice because they provided the Grievants with some assistance. In addition, the Unions claim that they took no further action on behalf of the Grievants because they thought that the original issues were resolved.[5] Furthermore, the Unions assert that the Grievants

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[2]Throughout this Opinion, the word "Unions" will refer to both, AFSCME, Local 2401 and AFSCME, D.C. Council 20, when they are mentioned collectively.

[3]This case was originally administratively dismissed by the Executive Director, but the Complainants filed a Motion for Reconsideration with the Board regarding the decision. As a result, the Board ordered the parties to brief specific issues concerning the Unions' level of assistance. After reviewing the briefs, the Board ordered a Hearing on the matter.

[4]According to the record, two sets of grievances were filed on behalf of the Grievants. The Hearing Examiner found that the first grievances were handled by Fonda Roy-Hankerson through the second step and were, primarily, in response to the workers' claims that the Agency was impermissibly instituting a realignment which would change the employees' schedules without giving them the proper notice or the opportunity to bargain over the impact and effects of the change. On or about October 23, 1998, after Ms. Hankerson thought that the realignment issue was resolved, the Grievants approached her again and completed "Official Grievance Forms" which raised other issues. (R & R at p.12). The second set of grievances was filed on or about March 30, 1999 by the individual Grievants after they had retained a private attorney, David Wachtel because their initial grievances were not responded to. (R & R at p.12). The Hearing Examiner found that this second set of grievances also included other claims that were not initially raised in the first grievances filed on behalf of the Complainants. (See, R & R at pgs. 7-10, 12-14, and 19-20).

[5]The Unions claim that they believed that the original grievance issue was resolved by the

(continued...)

later added claims that were not contained in their original grievances or were not expressed to the Unions. The Unions also claim that they did, in fact, communicate with the Grievants. They assert that the decision not to pursue arbitration was given to the Grievants in written form. In addition, the Unions contend that their handling of the grievances was not arbitrary, discriminatory or the result of bad faith, as is required for a finding of a breach of the duty of fair representation under the Board's standards. See, Barbera Hagans v. American Federation of State, County and Municipal Employees, Local 2743 (Hagans v. AFSCME, Local 2743), 48 DCR 10967, Slip Op. No. 646 at. p.5, PERB Case Nos. 99-U-06 and 99-S-26 (2001). While the Unions admit that the grievances could have been handled better[6], they also assert that the Unions' actions did not rise to the level of an unfair labor practice.

A hearing was held. The Hearing Examiner issued a Report and Recommendation. ("Report" or "R & R"). In her Report, the Hearing Examiner found that Council 20 and Local 2401 did not violate the Comprehensive Merit Personnel Act (CMPA) in their handling of the Complainants' grievances. Specifically, the Hearing Examiner found that the Complainants did *not* meet their burden of proving that the Unions violated their duty of fair representation. In making her decision, the Hearing Examiner noted the three criteria used to determine if a union has adhered to its duty to fairly represent its members. They include whether: (1) it treats members without hostility or discrimination; (2) it exercises discretion to assert the rights of individual members in good faith and honesty; and (3) it avoids arbitrary conduct. See, Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, 469 F. 2d 181, 183 (1972). The Board has adopted and applies this same standard. See, Ulysses S. Goodine v. Fraternal Order of Police/Department of Corrections Labor Committee, 43 DCR 5163, Slip Op. No. 476, PERB Case No. 96-U-16 (1996).

The Hearing Examiner elaborated on why the Complainants did not meet their burden. She explained that although it may not have been what the Complainants wanted, the Unions did provide its members with *some* assistance. In addition, she concluded that the Complainants did not present any evidence to support its contentions that the Unions' decisions in handling their grievances were unreasonable, arbitrary, discriminatory, or taken in bad faith. See, Hagans v. AFSCME, Local 2743, 48 DCR 10967, Slip Op. No. 646 at. p.5, PERB Case Nos. 99-U-06 and 99-S-26 (2001).

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[5](...continued)
reissuance of the letters giving employees proper notice of the realignment and any reassignments or schedule changes that would result.

[6]To explain why it did not handle the case in a better manner, the Unions point to: (1) the inexperience of some of its staff; (2) its poor communication with the Grievants; and (3) its disorder as a result of being under an administratorship.

Furthermore, the Hearing Examiner relied on the Vaca v. Sipes[7] standard, which the Board has adopted, to assert that finding a violation requires perfunctory handling, plus, arbitrary and bad faith conduct regarding the processing of the employee's grievance. See, 383 U.S. 171,177 (1967); Tracey Hatton v. Fraternal Order of Police, 47 DCR 769, Slip Op. No. 451, PERB Case No. 95-U-02 (2000). She also noted the Board's standard in Stanley O. Roberts v. American Federation of Government Employees, Local 2725, and observed that it "is not the competence of the Union, but rather whether the representation was in good faith and its actions motivated by honesty of purpose." 36 DCR 1590, Slip Op. No. 203 at p. 3, PERB Case No. 88-S-01(1989). Finally, the Hearing Examiner concluded that the Unions' handling of the grievances was reasonable under the circumstances because both parties were in a state of disarray and disorganization.[8]

The Complainants filed Exceptions to the Hearing Examiner's Report. In their Exceptions, the Grievants claim that the standard for finding that the Unions committed an unfair labor practice was met because the evidence shows that the Unions' actions were perfunctory. The Complainants contend that perfunctory action is enough to meet the standard for finding that the Unions breached their duty of fair representation to the Complainants. (Exceptions at p. 11). Specifically, they claim that "District of Columbia public employee unions owe their members something better than perfunctory grievance-handling" and rely on Vaca v. Sipes, as cited in Cynthia Allen-Lewis, et al. v. AFSCME, D.C. Council 20, et.al., to support this contention. See, 386 U.S. 171 and 47 DCR 5309, Slip Op. No. 624, PERB Case No. 99-U-24 (2000). In addition, the Grievants assert that the Unions acted in bad faith. In making this assertion, they reiterate the fact that the Complainants could not persuade the Union to act on the grievances without hiring a private attorney. Finally, the Grievants claim that Council 20, which makes decisions concerning the handling of grievance arbitrations for Local 2401 members, should not be held to a lesser standard because it was in a state of disarray. (Exceptions at p. 18).

After reviewing the record in the present case, the Board finds that the Hearing Examiner's findings are reasonable and supported by the record. We have held that no duty of fair representation violation lies where there is no evidence of arbitrary, discriminatory, or bad faith handling of

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[7]The Hearing Examiner noted that in Vaca v. Sipes, the Supreme Court described the duty of fair representation as the Union's obligation to act "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." (See, R & R at p. 17 and 386 U.S. 171, 177 (1967)).

[8]The record reflects that Council 20 had been placed in an administratorship several years earlier as a result of "impropriety of funds [and] staff" problems. ® & R at p.10; Tr. at p.29). The record also reflects that the District of Columbia Child and Family Services Agency (CFSA) was "under a receivership when it undertook a realignment in 1998." ® & R at p. 5).

grievances. See, Barbera Hagans v. American Federation of State, County and Municipal Employees, Local 2743, 48 DCR 10967, Slip Op. No. 646 at. p.5, PERB Case Nos. 99-U-06 and 99-S-26 (2001) and Ulysses S. Goodine v. Fraternal Order of Police/Department of Corrections Labor Committee, 43 DCR 5163, Slip Op. No. 476, PERB Case No. 96-U-16 (1996). In addition, we have held that a decision is not arbitrary just because a member disagrees with the Union's judgment. Barbera Hagans v. American Federation of State, County and Municipal Employees, Local 2743, 48 DCR 10967, Slip Op. No. 646 at. p.5, PERB Case Nos. 99-U-06 and 99-S-26 (2001).

According to the parties' collective bargaining agreement, the Union, Council 20 in this case, has exclusive authority to decide whether grievances go to arbitration. Furthermore, the Board has held that the duty of fair representation does not require that the Union take every grievance to arbitration. Freson v. Fraternal Order of Police, 31 DCR 2290, Slip Op. No. 74, PERB Case No. 83-U-09 (1984). Council 20 declined to pursue arbitration on the Grievants' behalf.

While the Board's precedent is clear that the Union is not required to pursue every grievance to arbitration, the Union is required to provide *some* level assistance in order to avoid being found in breach of the duty of fair representation. In Barbera Hagans v. American Federation of State, County and Municipal Employees, Local 2743[9], the Board found that the Union did not commit an unfair labor practice where it provided the Complainant with *some* level of assistance in handling her grievance and where it did not engage in conduct that was arbitrary, discriminatory or the product of bad faith. 48 DCR 10967, Slip Op. No. 646 at. p.5, PERB Case Nos. 99-U-06 and 99-S-26 (2001). As a result, the Board dismissed the Complaint after concluding that the record did not support a finding of a breach of the duty of fair representation. Id.

The Board finds that the facts in the present case are analogous to those in the Hagans v. AFSCME, Local 2743 case and, as a result, should be decided the same way. In the present case, the record demonstrates that the Unions provided the Grievants with some assistance by, *inter alia*: (1) attempting to resolve the Grievants' concerns about the realignment with various management officials; (2) filing written grievances on their behalf; and (3) advancing those grievances through the various steps of the process pursuant to the parties' collective bargaining agreement. In the present

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[9]In Barbera Hagans v. AFSCME, Local 2743, Ms. Hagans filed an Unfair Labor Practice (breach of the duty of fair representation) and Standards of Conduct Complaint against the Union concerning the handling of her grievance. 48 DCR 10967, Slip Op. No. 646, PERB Case Nos. 99-U-06 and 99-S-26 (2002). The underlying grievance concerned a dispute about her employee evaluation and other related issues. Id. In this case, Ms. Hagans hired a private attorney to assist her with her grievance, just as the Grievants did in the case presently before the Board. Id. The Board dismissed Ms. Hagans' complaint after it found that the Unions *did* provide her with *some* level of assistance and did not act in an arbitrary, discriminatory or bad faith manner. Id.

case, as in Hagans, the Grievants hired their own private attorney to assist them when they began to feel that their grievances were not being processed properly. It is also apparent in this case, as in the Hagans, that the Grievants were dissatisfied with Council 20's decision not to pursue their grievances to arbitration. However, that fact, in and of itself, does not constitute a breach of the duty of fair representation where no evidence of arbitrariness, discrimination, or bad faith is shown. Barbera Hagans v. American Federation of State, County and Municipal Employees, Local 2743, 48 DCR 10967, Slip Op. No. 646 at. p.6, PERB Case Nos. 99-U-06 and 99-S-26 (2001). As noted earlier, the Hearing Examiner did not find any evidence of arbitrariness, discrimination, or bad faith in this case. We conclude that the Hearing Examiner's finding on this issue is supported by the record. Additionally, we believe that the Hearing Examiner used the correct legal standard when concluding that the Unions did *not* violate their duty of fair representation. Therefore, we adopt the Hearing Examiner's finding that the Unions did not commit an unfair labor practice or violate the duty to fairly represent its members pursuant to D.C. Code §1-617.04(b)(1), as alleged by the Grievants.

A review of the record also reveals that the Complainants' Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where the findings are fully supported by the record. American Federation of Government Employees, Local 874 v. D. C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). The Board has also rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. American Federation of Government Employees, Local 2741 v. D. C. Department of Recreation Parks, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999). As noted earlier, we find that the Complainants' Exceptions merely disagree with the Hearing Examiner's Report and Recommendation. Furthermore, we note that the Complainant's Exceptions simply reiterate arguments that were previously made and rejected by the Hearing Examiner. In view of the above, we conclude that the Complainant's Exceptions lack merit.

Pursuant to D.C. Code §1-605.2(3)(2001 ed.) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. Therefore, for the reasons discussed above, we hereby adopt the Hearing Examiner's findings and conclusion that AFSCME, Local 2401 and AFSCME, Council 20 did *not* violate D.C. Code §1-617.04(b).

ORDER

IT IS HEREBY ORDERED THAT:

1. Cynthia Allen-Lewis, et. al.'s Complaint is hereby dismissed.

2. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

April 4, 2003

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 445, Complainant,	PERB Case No. 01-U-03 Opinion No. 704 FOR PUBLICATION
v.	
DISTRICT OF COLUMBIA OFFICE OF PROPERTY MANAGEMENT, Respondent.	

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by the International Brotherhood of Police Officers, Local 445 ("Complainant" or "IBPO") against the District of Columbia Office of Property Management ("Respondent", "OPM" or "Agency"), alleging that OPM violated D.C. Code §1-617.04 (a)(1) and (5)(2001 ed.)[1]. Specifically, the Complainant asserts that OPM committed an unfair labor practice by failing to bargain, upon request, over the impact and effects of its decision to contract out security work that had formerly been performed by bargaining unit Security Officers to non-bargaining unit Security Guards.[2]

[1]Throughout this Opinion, all references to the D.C. Code will refer to the 2001 edition, unless otherwise noted.

[2]In September 1999, shortly after Thomas Francis became the new Chief of OPM's Office of Protection Services, he concluded that a staffing shortage would no longer permit the Agency to continue to fulfill its then-mission of staffing fixed posts with bargaining unit Security Officers. In making this decision, Chief Francis relied on Federal Position Classification Guidelines to determine that manning fixed posts was more properly classified as Security Guard work. As a result, he determined that manning fixed posts would no longer be the mission of OPM's bargaining unit Security Officers. Instead, Patrol and Compliance would be their new mission, and contract Security Guards would fulfill their former mission of manning fixed posts. He notified bargaining unit members of this change by letter on July 19, 2000. IBPO requested to bargain over the issue by letter on at least two separate occasions. While the parties did meet on September 8th to discuss OPM's proposed changes in bargaining unit members' work

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The Respondent denies the allegation. The Respondent claims that the Management Rights provisions of the Comprehensive Merit Personnel Act[3] ("CMPA") authorize it to contract out work that has never been classified as bargaining unit work. Additionally, the Agency contends that: (1) a staffing emergency entitled it to employ contract guards at the fixed posts; (2) the parties' past practice, pursuant to Article 15 of the parties' now-expired collective bargaining agreement---permits it to reassign bargaining unit employees in the event of an emergency; and (3) OPM met its statutory obligation to bargain over the usage of contract guards at fixed posts during a November 20, 2000 meeting with the Union.

A hearing was held and the Hearing Examiner issued a Report and Recommendation.[4] (R &R). The Hearing Examiner found that the Respondent violated D.C. Code §1-617.04 (a)(1) and (5) (2001 ed.).[5] As a result, he recommended a *status quo ante* remedy, which would return the

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[2](...continued)
assignments, they never bargained over the impact and effects of the Agency's decision to use contract guards instead of bargaining unit members to man fixed posts. As a result, IBPO contends that OPM violated D.C. Code §1-617.04(a)(1) and (5) (2001 ed.).

[3] D.C. Code § 1-617.08(a) (6) (2001 ed.) provides that management has the right, in accordance with applicable laws and rules and regulations, to "take whatever actions may be necessary to carry out the mission of the District government in emergency situations."

[4]The issue before the Hearing Examiner was the following: Did OPM wrongfully fail to engage in impact and effects bargaining over its decision to assign contract guards to fixed posts at certain locations, including 441 4th Street, NW and 300 Indiana Ave, NW?

[5]In concluding that OPM violated D.C. Code §1-617.04 (a) (1) and (5) (2001 ed.), the Hearing Examiner first acknowledged that notwithstanding any issue of work classification, exclusively bargaining unit Officers had been staffing these fixed posts. He then noted that Chief Thomas Francis acknowledged that the mission of the Agency had been one of staffing these fixed posts, and not one of Patrol and Compliance. Furthermore, the Hearing Examiner observed that, so far as the record shows, no one other than bargaining unit Officers had staffed these fixed posts prior to the action giving rise to this proceeding. On this basis, the Hearing Examiner concluded that "the Agency in fact altered the working conditions of the bargaining unit Officers when it determined to assign contract guards to posts formerly and exclusively staffed by bargaining unit Officers." (R & R at p. 7). To support his position, the Hearing Examiner relied on Board precedent in finding that, " even if Chief Francis is correct in determining that bargaining unit Officers should not properly have been assigned to those fixed posts... a question that the Hearing Examiner emphasizes is not challenged in this proceeding...the Agency; nevertheless, is required to negotiate the impact and effects of the decision to change the working
(continued...)

bargaining unit personnel to the very work assignments they traditionally occupied at fixed posts. Also, the Hearing Examiner recommended that the Agency be ordered to bargain, as appropriate, with the IBPO concerning its decision to contract out work formerly performed exclusively by bargaining unit employees. OPM filed Exceptions to the Hearing Examiner's R&R.

In its Exceptions, OPM disagrees with the Hearing Examiner's findings. Specifically, OPM asserts that the Hearing Examiner's conclusion that the Respondent did not engage in impact and effects bargaining is: (1) incorrect; (2) internally inconsistent with the Hearing Examiner's own findings; and (3) unsupported by the record.[6] (Exceptions at p. 7). Additionally, the Respondent asserts that the Hearing Examiner's characterization of Chief Thomas Francis's correction of a long overdue classification error as an "Agenda"...is not reflective of the admitted, uncontested record evidence regarding this point. Furthermore, OPM argues that the classification issue improperly influenced the Hearing Examiner's decision. The Agency also raised two procedural arguments concerning the form[7] of the Hearing Examiner's recommended remedy and the Hearing Examiner's decision to allow the testimony of a rebuttal witness, over the Respondent's objection.[8]

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[5](...continued)
conditions of bargaining unit employees." (R & R at p.8) International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 41 DCR 2321 Slip Op. No. 312, PERB Case No. 91-U-06 (1992), *aff'd sub nom.,* District of Columbia General Hospital v. Public Employee Relations Board & International Brotherhood of Police Officers, Local 446, MPA 92-12 (1993) ; International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992). The Hearing Examiner reached this conclusion despite the Agency's contention that the work assigned to the contract guards is not bargaining unit work.

[6]In their Exceptions, the Agency asserts that the bargaining which took place between the parties concerning the Agency's changed mission and the bargaining unit's new work assignments fulfilled its bargaining obligation under the CMPA. The Board finds that this is merely a disagreement with the Hearing Examiner's finding that the bargaining which took place between the parties was not sufficient. As mentioned earlier, the Hearing Examiner concluded that the parties should have bargained concerning the impact and effects of management's decision to assign contract guards to bargaining unit members' work assignments, prior to the decision being implemented.

[7]OPM contended that the Hearing Examiner's recommended remedy was written more like an Order than a recommendation.

[8]OPM asserts that this witness was so vital to the case that she should have been presented in the IBPO's case-in-chief and the fact that this witness gave testimony after all of the
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After reviewing the record, the Board finds that the Agency's Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where those findings are fully supported by the record. American Federation of Government Employees, Local 874 v. D. C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). Also, the Board has rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. American Federation of Government Employees, Local 2741 v. D. C. Department of Parks and Recreation, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999). On this basis, we reject OPM's exceptions concerning the Hearing Examiner's finding that the Agency violated the CMPA.

We have held that an Agency must bargain over the impact and effects of a management's right decision, upon request.[9] The record is clear that IBPO made a request to bargain and that OPM

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[8](...continued)
other witnesses had been heard prejudiced its case. The Board finds no merit to this argument. The Board's rules are clear that the Hearing Examiner has the authority to rule on the parties' objections in the course of a Hearing. (See, Board Rules 550.13 and 550.14- which respectively, outline the Hearing Examiner's authority and set forth the procedure by which objections are heard before a Hearing Examiner). OPM merely disagrees with the Hearing Examiner's ruling on this issue. Therefore, the Board finds that this mere disagreement does not provide a basis for rejecting the Hearing Examiner's recommendation.

[9] See, International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 41 DCR 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1992), *aff'd sub nom.*, District of Columbia General Hospital v. Public Employee Relations Board. & International Brotherhood of Police Officers, Local 446, MPA 92-12 (1993); International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322 at pages 3 and 5, PERB Case No. 91-U-14 (1992)- where the Board held that D.C. General Hospital (DCGH) violated the CMPA by refusing to bargain in good faith over the impact and effects of its decision to require special police officers to transport mental observation patients from one department of the hospital to another. IBPO v. DCGH, 39 DCR 9633, Slip Op. No. 322 at pages 3 and 5, PERB Case No. 91-U-14 (1992). Because this decision concerned DCGH's 's right to determine its internal security practices, the Board found that only impact and effects bargaining was required. See, Id. and D.C. Code §1-617.08 (a)(5) (2001 ed.). The Board noted that "where there exists a duty to bargain over the impact and effects of...decisions involving the exercise of a managerial prerogative...categorically refusing to bargain over those aspects..., prior to implementation" is done so at the "risk" of the party having the duty. Id. at pg. 4 . In addition, the Board found that DCGH's act of meeting with employees

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did *not* engage in such bargaining. As a result, the Board finds that the Hearing Examiner's finding that OPM committed an unfair labor practice is reasonable, persuasive, and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's finding on this issue.

Since we have adopted the Hearing Examiner's finding that OPM violated the CMPA, we now turn to the issue of what is the appropriate remedy. As relief, IBPO sought an order directing the parties to bargain over the impact and effect of OPM's decision and a *status quo ante* remedy. However, the Agency argued that a *status quo ante* remedy would *not* be appropriate because, *inter alia*, it would disrupt or impair the Agency's operations.

As noted earlier, to remedy this unfair labor practice, the Hearing Examiner recommended that the Board issue an order directing the Respondent to bargain, as appropriate, over its decision to contract out fixed post duties formerly performed exclusively by bargaining unit personnel. In addition, the Hearing Examiner recommended that the Board Order OPM to: (1) post an appropriate notice of its violation of the law and (2) implement a *status quo ante remedy.*[10]

The Hearing Examiner supported his recommended relief by making several observations. First, the Hearing Examiner noted that " a refusal to grant such an order would eviscerate the Union's right to engage in impact and effects bargaining" over the Agency's decision to assign contract guards work that had previously and exclusively been performed by bargaining unit personnel. (R & R at p.11). Additionally, he observed that "the record shows that the Agency fundamentally misconstrued its bargaining obligations in this matter and literally ignored its obligation to engage in such bargaining." (R & R at p.11). Furthermore, the Hearing Examiner concluded that he was not persuaded that a *status quo ante* order would adversely affect the Agency's mission, nor was he persuaded that this remedy would negate any management right. Rather, he concluded that such a remedy will do no more than return the parties to the position they should have been in before the Agency wrongfully failed to engage in impact and effects bargaining. (R & R at p. 11). Finally, he noted that the issuance of a *status quo ante* remedy under the circumstances of this case is supported by the Board's case law. See, International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992) and (R & R at p. 13).

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[9](...continued)
for input concerning the decision was not bargaining; therefore, it was insufficient for meeting its bargaining obligation. Id. As a result, the Board concluded that DCGH violated D.C. Code §1-617.04 (a)(5) (2001 ed.). Id.

[10] In recommending that *status quo ante* relief be granted, the Hearing Examiner suggested that the Board order that bargaining unit Officers be returned to their fixed posts and that bargaining begin concerning the impact and effects of management's decision to use contract guards to perform bargaining unit work.

The Respondent excepted to the Hearing Examiner's recommended remedy. Specifically, OPM asserts that the Hearing Examiner's proposed remedy has no basis in law or under the facts presented at the hearing.[11] Furthermore, the Agency claims that this *status quo ante* remedy is wholly inappropriate under the facts of this impact and effects bargaining case. OPM asserts that the Hearing Examiner's recommended remedy "obviously ignores the Board's recent movement in this area of remediation." (Exceptions at p. 11). OPM relies on the Board's Decision in Fraternal Order of Police/Metropolitan Police Labor Committee v. Metropolitan Police Department[12](FOP/MPDLC v. MPD) to support of its claim that a *status quo ante* remedy is not appropriate in this case. 47 DCR 9633, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). Furthermore, OPM contends that the Hearing Examiner's reliance on International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital is improper and is not controlling[13]. 39 DCR 9633, Slip

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[11] Specifically, OPM claims there is absolutely no evidence demonstrating that additional bargaining would change the Respondent's decisions in this matter. (R & R at 12) Furthermore, OPM contends that the removal of protective service police officers from their Patrol and Compliance duties and returning them to fixed posts would seriously impact the effectiveness of the Agency and impede the redirection of the Agency's mission. In the Respondent's view, these actions could potentially affect the costs of existing service contracts and result in immediate staffing shortages. (R & R at p. 12). The Agency also relied on AFGE, Local 872 v. D.C. Department of Public Works, where the Board held that restoration of *status quo ante* was inappropriate where: (1) DPW's bargaining obligations only attached to the impact and effects of a RIF and no evidence establishes that bargaining would have any effect on the RIF and (2) rescission of RIF would disrupt or impair DPW's operations. 49 DCR 1145, Slip Op. NO. 439; PERB Case No. 94-U-02 and 94-U-08 (2002).

[12] In FOP/MPDLC v. MPD, the Board held, *inter alia,* that the restoration of the *status quo ante* is generally inappropriate to redress a refusal to bargain over impact and effects of a decision made pursuant to the management rights provisions of the CMPA. 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000).

[13]In response to this particular argument, the Board believes that the Hearing Examiner used the correct legal standard in determining that impact and effects bargaining was required under the facts of the present case, as set forth in IBPO, Local 446, AFL-CIO v. DCGH, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-12 (1992). In response to OPM's contention that the Hearing Examiner's recommended remedy "obviously ignores the Board's recent movement in this area of remediation, the Board notes that AFGE, Local 872 v. D.C. Department of Public Works, and FOP/MPDLC v. MPD do, in fact, give more specific guidance on when awarding *status quo ante* relief is appropriate; however, we do not believe that the Hearing Examiner's use of IBPO, Local 446, AFL-CIO v. DCGH was improper, although it certainly is not controlling

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Op. No. 322, PERB Case No. 91-U-14 (1992) and (R & R at p. 13).

When a violation is found, the Board's order is intended to have therapeutic, as well as remedial effect. AFSCME Local 2401 and Neal v. D.C. Department of Human Services, 48 DCR 3207, Slip Op. No. 644, and PERB Case No. 98-U-05 (2001); D.C. Code §§1-605.02(3) and 1-617.13 (a) (2001 ed.). Moreover, the overriding purpose of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations. Id.

The Board has held that *status quo ante* relief is generally inappropriate to redress a refusal to bargain over impact and effects. FOP/MPDLC v. MPD, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). Furthermore, the Board has determined that *status quo ante* relief is *not* appropriate when the: (1) rescission of the management decision would disrupt or impair the Agency's operation; and (2) there is no evidence that the results of such bargaining would negate a management rights decision. Id.

After reviewing the record and relevant Board precedent as noted above, we find that *status quo ante* relief is *not* appropriate in the present case. Specifically, the Board finds that returning the workers to the positions that they were in prior to management's decision to hire contract Security Guards after such a significant lapse of time would be disruptive to OPM's operations. Furthermore, we find that there is *no* evidence in this case that the results of further bargaining would negate OPM's decision to use contract Security Guards. As a result, we reject the Hearing Examiner's recommendation concerning *status quo ante* relief.[14] However, we adopt the Hearing Examiner's recommendation concerning other appropriate relief. On this basis, the Board directs that the parties bargain over the impact and effects of OPM's decision to hire contract guards to man fixed post locations. Additionally, the Board directs that OPM post a notice indicating that it has committed an unfair labor practice by the actions described in this Opinion.

In ordering the parties to bargain over the impact and effects of OPM's decision to hire contract guards to man fixed post locations, the Board recognizes that the passage of time may have rendered some of the issues concerning management's decision *moot*. Nevertheless, we believe that ordering the parties to engage in impact and effects bargaining over issues which are still *ripe* or relevant is appropriate. We believe that this remedy will achieve the goals of the Board's remedies,

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[13](...continued)
precedent on the standard for granting *status quo ante* relief. See, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-12 (1992); 49 DCR 1145, Slip Op. NO. 439, PERB Case No. 94-U-02 and 94-U-08 (2002) and 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000).

[14]We grant OPM's exception on the issue concerning *status quo ante* relief only. As noted above, we do not believe that *status quo ante* relief is appropriate in this case.

as outlined in the CMPA and the relevant Board precedent.

Pursuant to D.C. Code §1-605.2(3) (2001 ed.) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and for the reasons discussed above, we adopt the Hearing Examiner's findings and recommended remedy, with the exception of his recommendation concerning *status quo ante* relief.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Office of Property Management (OPM), its agents and representatives, shall cease and desist from violating D.C. Code §1-617.04(a)(1) and (5) (2001 ed.), by refusing to bargain on request concerning the impact and effects of its decision to contract out security duties at fixed post locations that had formerly been staffed by bargaining unit employees.

2. The Board directs the parties to commence bargaining over the impact and effects of any issues that are still ripe or relevant to OPM's decision to contract out security duties at fixed posts within (30) days of the issuance of this Opinion.

3. OPM shall post conspicuously within ten (10) days from the service of this Opinion the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.

4. OPM shall notify the Public Employee Relations Board (PERB), in writing, within fourteen (14) days from the date of this Order that the Notice has been posted.

5. Within forty-five (45) days from the date of this Order, OPM shall notify the Public Employee Relations Board (PERB), in writing, of the steps that it has taken to comply with paragraph number 2 of this Order.

6. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

April 11, 2003

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
FRATERNAL ORDER OF POLICE/ DEPARTMENT OF CORRECTIONS LABOR COMMITTEE,	PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32
	Opinion No. 722
Complainant,	FOR PUBLICATION
v.	
DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,	
Respondent.	

DECISION AND ORDER

This matter involves a consolidated unfair labor practice complaint filed by the Fraternal Order of Police/ Department of Corrections Labor Committee ("FOP" or "Union") against the Department of Corrections ("DOC" or "Agency")[1]. The complaint alleges that DOC violated the CMPA[2] by: (1) refusing to bargain in good faith concerning the impact and effects of a reduction in force (RIF)[3] ; (2)

[1]The unfair labor practice complaints were individually filed as PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32. Upon Complainant's Motion, the Hearing Examiner ordered that PERB Case No. 01-U-21 be dismissed on the basis that all of the factual predicates and legal arguments in that case are also included in PERB Case No. 01-U-28. There were no objections to this motion. The Board adopts the Hearing Examiner's ruling that PERB Case No. 01-U-21 should be dismissed.

[2]Specifically, FOP contended that DOC violated D.C. Code §1-617.04 (a)(1),(3), (4), (5) (2001 ed.) by the acts alleged above. The Union also contends that DOC discriminated against bargaining unit members with respect to terms and conditions of employment in order to discourage membership in the union and interfered with, restrained, and coerced bargaining unit employees in the exercise of protected Union activity.

Throughout this Opinion, all references to the D.C. Code refer to the 2001 edition.

[3]The Reduction-in-Force (RIF) actions were being implemented in order to bring about the closure of the Lorton Complex pursuant to the National Capital Revitalization and Self Government Act of 1997.

refusing to provide information necessary for Complainant to conduct its representational functions concerning the impact and effects of the RIF; (3) taking reprisals against the Union Chairman[4] by attempting to eliminate four years of service credit he had earned; and (4) taking other[5] actions based on anti-union animus, such as failing to RIF parenthetical positions[6].

The Respondent denies the allegations. The Respondent contends, *inter alia,* that it did bargain in good faith with FOP over the RIF. DOC also argues that it did, in fact, produce documents that were available to it at the time of the request.[7] Furthermore, DOC asserts that it met

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[4]The FOP Chairman at the time of this Complaint was Mr. William Dupree.

[5]At the hearing, FOP also introduced evidence to support allegations that Earnest Durant and William Dupree were retaliated against for engaging in protected activity, even though those allegations were not raised in the Complaint for PERB Case No. 01-U-32. The Hearing Examiner determined that there was no need to consider this allegation because it was raised and resolved in the Board's decision issued in PERB Case No. 01-U-16. Fraternal Order of Police/Department of Corrections Labor Committee (on behalf of Georgia Green, William Dupree and Earnest Durant) v. D.C. Department of Corrections, 50 DCR 5059, Slip Op. No. 698, PERB Case No. 01-U-16 (2003). The Board finds that this determination is reasonable and adopts the Hearing Examiner's finding on this issue.

In addition, the Union contends that DOC violated D.C. Code §1-617.04(a)(1)(2001 ed.) by failing to:(1) properly classify employees; (2) conduct and complete performance appraisals; (3) keep proper records of and provide information concerning employee details. Finally, FOP contends that DOC violated the CMPA by rescinding the reduction-in-force notices of certain non-bargaining unit employees.

[6]Parenthetical positions are those that are in a different classification because they require specified training. For example, parenthetical positions at DOC would be Criminal Investigator (Internal Affairs); Criminal Investigator (Drug Detection); and Correctional Officers (Bilingual). The Hearing Examiner did not find a violation based on DOC's failure to include parenthetical classifications in the RIFs. The Hearing Examiner reasoned that the selection of which employees will be subject to a RIF is an exclusive management right pursuant to D.C. Code 1-617.08 (a) (2) and (3). Absent evidence of discriminatory motive or intent, the Hearing Examiner noted that the Agency's decision concerning these matters is not open to challenge. (R & R at pg. 42).

[7]One of the major categories of documents sought by the Union was retention registers. The Agency argued that the retention registers did not exist at the time that they were requested. In finding the violation of D.C. Code §1-617.04 (a)(5), the Hearing Examiner observed that DOC did not establish that the kind of information contained in retention registers did not exist or could

its bargaining obligation and provided notice and an opportunity to bargain over the RIF. DOC contends that since the administrative order was delivered at the same time as the RIF notices, no violation should be found. Finally, DOC argues that it did not show anti-union animus toward Mr. Dupree or interfere or discourage any other union employee through its actions.

A hearing was held in this matter. As a result, the Hearing Examiner found that the Respondent violated the Comprehensive Merit Personnel Act ("CMPA").[8] Specifically, the Hearing Examiner found that DOC violated D.C. Code §1-617.04 (a)(1) and (5) by: (1) failing to bargain collectively and in good faith with the Complainant concerning the impact and effects of RIFs and (2) refusing to provide information necessary for the Complainant to conduct its representational functions concerning the impact and effects of the RIF. In addition, the Hearing Examiner found that DOC violated D.C. Code §1-617.04 (a)(4) by taking reprisals against Mr. Dupree when it sought to eliminate four years of previously authorized valid service credit he had earned. As to the remaining alleged violations of D.C. Code §1-617.04 (a)(1), (3), (4) and (5), the Hearing Examiner found that the Complainant did not meet its burden of proof. As a result, he recommended that those allegations be dismissed.

As a remedy for DOC's unfair labor practice violations, the Hearing Examiner recommended that an Order be issued which, inter alia, ordered DOC to: (1) cease and desist from refusing to bargain; (2) cease and desist from refusing to produce documents; and (3) bargain on an expedited

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not be furnished without undue burden, despite Respondent's contention that the retention register itself did not exist.

[8]The Hearing Examiner considered the following issues:

> (1) Whether the Respondent violated D.C. Code §1-617.04 by failing to bargain collectively in good faith concerning the impact and effects of the RIFs implemented to bring about the closure of the Lorton Complex?
>
> (2) Whether the Respondent violated D.C. Code §1-617.04(a)(1) and (5) by refusing to provide information necessary for the Complainant to conduct its representational functions concerning the impact and effects of the RIFs?
>
> (3) Whether the Respondent violated D.C. Code §1-617.04 (a)(3) or (4) by interfering, restraining, coercing, discharging or taking reprisal actions against any employees because they exercised their right to engage in protected activity?

basis and with retroactive effect over the impact and effects of the previous RIFs. The Hearing Examiner also recommended that the Board order DOC to: (1) cease and desist from retaliating against William Dupree for engaging in protected activity; (2) restore Dupree's four (4) years of credited service; and (3) recompute his retention standing.[9] Finally, the Hearing Examiner did not recommend that the Board award costs because he determined that the interest of justice test was not met.[10]

DOC presented numerous exceptions to the Hearing Examiner's Report and Recommendations[11] ("R & R" or "Report") which are partially summarized in this Opinion and are not all mentioned in detail in this Opinion. Essentially, DOC contends that: (1) the Hearing Examiner failed to give the proper weight to the efforts DOC made to bargain over the RIF; (2) it provided all the information that was available at the time of FOP's request, (3) the failure to credit Mr. Dupree with four years of creditable service was not based on anti-union animus, but based on District

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[9]The Hearing Examiner determined that no backpay was appropriate at this time; however, if backpay was later found to be appropriate the Union may request backpay or other appropriate remedy. The Board adopts this finding.

[10]The Board has awarded costs when it determines that: (1) the losing party's claim or position was wholly without merit; (2) the successfully challenged action was undertaken in bad faith; and (3) a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative. See, AFSCME, District Council 20, Local 2776 v. D.C. Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). We believe that the Hearing Examiner's finding is reasonable and supported by the record and relevant law. Therefore, we adopt this finding.

[11]Other Exceptions that DOC noted in its filing follow below:

- There is no authority for the Hearing Examiner's position that the failure to comply with RIF laws and regulations violates the duty to bargain in good faith.
- The conclusion that the retention register could have been given sooner was a gross misunderstanding of the evidence and was reversible error.
- The Agency Representatives' testimony, which suggested to the Hearing Examiner that a retention register could have been given sooner is a gross misunderstanding of the evidence and record and constitutes reversible error. Furthermore, DOC asserts that Mr. Michael Jacobs' statement was referring to an administrative order, not the retention register because that is what he was holding in his hand while he was testifying.
- After May, 25, 2001, the relevant period according to DOC, the parties met and exchanged proposals.

government regulations which govern an employee's break in service; and (4) that the Hearing Examiner failed to consider the totality of the circumstances. (See, Respondent's Exceptions and Memorandum in Support of its Exceptions). A review of the record reveals that the Agency 's Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where the findings are fully supported by the record. See, American Federation of Government Employees, Local, 874 v. D. C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). The Board has also rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. See, American Federation of Government Employees, Local 2741 v. D. C. Department of Recreation Parks, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999).

After reviewing the record in the present case, we find that the Hearing Examiner's findings are reasonable and supported by the record. The Board has held "that the effects or impact of a non-bargainable management decision, such as a RIF, upon the terms and conditions of employment is bargainable upon request." See, International Brotherhood of Police Officers and D.C. General Hospital, 39 DCR 9633, Slip Op. No. 322 at p. 3, PERB Case No. 91-U-14 (1992). The Board's law is clear that an Employer violates the duty to bargain in good faith by refusing to bargain, upon request, over the impact and effects of a RIF and by refusing to produce documents related to the RIF. As a result, we conclude that the Hearing Examiner's findings are: (1) reasonable, (2) consistent with Board precedent, and (3) supported by the record.

Despite our finding in support of the Hearing Examiner's R & R, we believe that some statements made in the Hearing Examiner's R & R need to be clarified. For instance, it is not our function to determine whether a RIF was conducted according to the District of Columbia RIF regulations, that is the D.C. Office of Employee Appeals' function, as properly noted by DOC in their Exceptions and codified in the CMPA. (See, D.C. Code §1-606.03[12]) However, that does not negate the fact that what is relevant in this case is whether DOC met its obligation to bargain over the impact and effects of the RIF. In this case, the Hearing Examiner determined that DOC didot meet its obligation. We agree. In making the determination, the Hearing Examiner noted that he considered factors such as: (1) the number and frequency of negotiation sessions; (2) scope; (3) timing; and (4) surrounding facts and circumstances, including the Department's willingness to negotiate over specific issues. (See, R & R at p. 30). While DOC believes that the Hearing Examiner did not give proper weight to evidence concerning its bargaining efforts, the Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." Doctors Council of the District of Columbia and Henry Skopek v. D.C. Commission on Mental Health Services, 47 DCR 7551, Slip Op. No. 636 at p. 4, PERB Case No. 99-U-06. It is not our role to second guess those credibility resolutions.

[12]D.C. Code §1-606.03 outlines the jurisdiction of the Office of Employee Appeals.

In addition, we believe that some issues concerning when the duty to bargain begins and when the obligation to produce documents begins in RIF cases merit further discussion. In prior cases, the Board has looked at this issue on a case by case basis, but has never pin-pointed when the actual duty begins. In one case involving a RIF, the Board held that there is no duty to bargain over the impact and effects of a management decision unless and until management decides to implement a change. See Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department (FOP v. MPD), 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). In Fraternal Order of Police/Department of Corrections Labor Committee v. Department of Corrections (FOP v. DOC),[13] the Hearing Examiner concluded that the RIF was never implemented; therefore, pursuant to our holding in FOP v. MPD, the request to bargain was pre-mature and there was no duty to bargain over the proposed RIF. See, Fraternal Order of Police/Department of Corrections Labor Committee v. Department of Corrections, 49 DCR 8937, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 00-U-40 (2002).

In the present case, there is no issue concerning whether a decision was made to RIF employees. The decision was made and an administrative order was signed. However, it still may be helpful for the Board to pinpoint when, in the case of RIFs, the obligation to bargain and to produce documents begins. [14] After much review and discussion of this matter, the Board has determined that the obligation to bargain upon request begins, at the latest, when the administrative

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[13]In this case, the administrative order had not been signed and issued. In addition, no retention register had been created.

[14]The Board's case law is not clear on when the duty to bargain concerning a RIF begins or stated another way, when the decision to conduct a RIF has been made. One case states that the duty begins before the RIF notices go out, but does not specify how long before the notices go out. See, American Federation of Government Employees, Local 872 v. D.C. Department of Public Works, 49 DCR 1145, Slip Op. No. 439, PERB Case Nos . 94-U-02 and 94-U-08 (2002). Another case mentions language from the District Personnel Manual which suggests that once an administrative order is signed, Management has the authority to conduct a RIF. See, Fraternal Order of Police/Department of Corrections Labor Committee v. Department of Corrections ,49 DCR 8937, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 00-U-40 (2002). The Federal Labor Relations Authority and National Labor Relations Board have language in their cases which suggests that the duty begins before the RIF notices go out. See, Lexington Blue Grass Army and Air Force Exchange Service WACO Distribution Center v. AFGE, Local 4042, 38 FLRA 647 (1997) and Odebrecht Contractors of California, Inc. And International Union of Operating Engineers, Local 12, AFC-CIO ,324 NLRB 396 (1997). However, the parties did not cite, nor did the Board locate any case which pinpoints with specificity when the decision to RIF has been made or when exactly the duty to bargain and/or provide documents actually begins.

order is signed. At that point, the Agency has made a decision to conduct a RIF and is authorized to do so. This is not to say that it cannot cancel or suspend implementation of the RIF once the decision is made. However, the administrative order does give some guidance concerning whether and when the decision has been made to conduct a RIF and represents a point at which the Agency's plans have crystallized enough so impact and effects bargaining can be meaningfully conducted.

Concerning document requests in general and especially those related to an impending RIF, the Board finds that the duty to produce those documents is ongoing because an exclusive representatives' duty to represent its members is ongoing. Furthermore, the Board has found that an employer violates the CMPA by failing to provide, upon request, information relevant and necessary to the union's role as exclusive bargaining agent. See, Doctors Council of D.C. General Hospital v. D.C. General Hospital, 46 DCR 6268, Slip Op. No. 482, PERB Case No. 95-U-10 and 95-U-18 (1999). Therefore, when a union hears rumblings of a RIF and seeks to gain information concerning a proposed RIF, it is not unreasonable to expect that an Agency would be required to produce information that is specifically requested, provided that the information is available or obtainable. On this basis, it appears to the Board that in cases such as this one, the duty to provide documents may precede the obligation to engage in impact and effects bargaining.

The Board also adopts the Hearing Examiner's finding and recommendation concerning anti-union animus being a motivating factor in the Agency's reluctance to apply Mr. William Dupree's four (4) years of creditable service. Specifically, we believe that this finding is (1) reasonable; (2) supported by the record; (3) and consistent with the Board's precedent.

Because the Hearing Examiner determined that the remaining allegations[16] raised by FOP

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[15]In the Board's view, it is not so unreasonable to expect the Agency to provide documents which may relate to an impending RIF, even if no final decision to implement the RIF has been made. The union could use that information to see where its members fall on the retention register. For instance, a union might seek documents pertaining to outstanding ratings in order to determine whether some of its members have an outstanding rating and thus, qualify for the extra points to be added to their retention score. The same is true for information concerning military service, years of service, and which classifications are slated for abolishment. This type of information can help the Union prepare for an impending RIF. If there are mistakes in the record, they can be corrected before the actual RIF notices go out. In this case, the RIF notices, administrative order, and retention register were supplied simultaneously and therefore; enough time was not allowed to explore these issues. Furthermore, the Hearing Examiner noted testimony from an Agency representative which suggested that a draft version of the retention register could have been provided sooner than it was, even if that version was not a final one.

[16] These allegations are summarized in footnotes 5 and 6 of this Opinion and are described in detail in the Hearing Examiner's Report and Recommendation.

were not supported by the record evidence and did not violate D.C. Code §1-617.04 (a)(1),(3), (4) and (5), the Board dismisses those allegations, consistent with the Hearing Examiner's Report and Recommendation. (See, R & R at p. 45).

Pursuant to D.C. Code §1-605.02 (3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. As a result, we adopt the Hearing Examiner's findings and conclusion that DOC committed the specified unfair labor practices described above. In addition, we adopt the Hearing Examiner's finding that the union did not provide support to meet its burden in showing that DOC committed the other unfair labor practices which are not discussed in detail[17].

ORDER

IT IS HEREBY ORDERED THAT:

1. DOC will cease and desist from refusing to bargain with FOP.

2. DOC will cease and desist from refusing to produce documents upon request.

3. DOC will bargain with FOP on an expedited basis and with retroactive effect over the impact and effect of the previous RIFs, consistent with the Hearing Examiner's Report and Recommendation.

4. DOC shall cease and desist from retaliating against FOP's former Chairman, Mr. Dupree, for engaging in protected activity.

5. The allegations which were not found to be supported in the Hearing Examiner's Report and Recommendation are dismissed.

(See, R & R at pgs. 21-23).

[17]Also, the Board adopts the Hearing Examiner's finding that it was proper to dismiss PERB Case No. 01-U-21 on Complainant's motion.

6. PERB Case No. 01-U-21 is dismissed.

7. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

August 13, 2003

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
DISTRICT OF COLUMBIA FIRE AND EMERGENCY SERVICES DEPARTMENT, Petitioner,	PERB Case No. 02-A-08 Opinion No. 728 FOR PUBLICATION
and	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3721, Respondent.	

DECISION AND ORDER

The District of Columbia Fire and Emergency Services Department ("FEMS", "Petitioner" or "Agency"), filed an Arbitration Review Request ("Request") in the above caption matter. Specifically, FEMS seeks reversal of an Arbitrator's[1] Award which found that FEMS violated its collective bargaining agreement (CBA) with the American Federation of Government Employees, Local 3721("AFGE", "Respondent" or "Union"). [2] AFGE opposes the Request.[3]

The issue before the Board is whether "the Award on its face is contrary to law..." D.C. Code§1-605.02(6) (2001 ed.).[4]

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[1]Charles Donegan was the Arbitrator in this matter.

[2]The underlying grievance asserted that FEMS violated the parties' CBA by requiring paramedics to work 24 hour shifts, when their contract specified that their shifts were not to exceed 12 hours a day.

[3]The reasons for AFGE's opposition are outlined in detail in its document entitled, "AFGE Local 3721's Opposition to Arbitration Review Request." (" Opposition").

[4]Throughout this Opinion, all references to the D.C. Code refer to the 2001 edition.

In 1999, FEMS instituted a new program which paired paramedics with firefighters on fire engines in an attempt to improve response times for reaching accident scenes. The paramedics served on a voluntary basis. The Union objected to this new program because it required paramedics to work 24 hour shifts, instead of the 12 hour shifts allowed by the plain language of their collective bargaining agreement with FEMS.[5] As a result, the Union filed a grievance concerning the matter. After the grievance reached the arbitration stage, the Arbitrator found that FEMS had violated the plain language of the parties' CBA. Specifically, he concluded that FEMS had improperly allowed Emergency Personnel to work twenty-four (24) hour shifts, despite the fact that the language in the paramedics' CBA specified that their shifts were not to exceed twelve (12) hours. (Award at pgs. 8-9).

FEMS takes issue with the Arbitrator's Award. Specifically, the Agency asserts that the Arbitration Award, on its face, is contrary to law.[6] Furthermore, FEMS argues that it had

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[5] An Addendum to the AFGE and FEMS CBA described the work schedules for Emergency Ambulance Bureau Personnel and provided the following:

> Emergency Ambulance Bureau personnel shall work twelve (12) hour shifts as their normal scheduled daily tour of duty and which shall continue to constitute for pay and leave purposes, a forty (40) hour workweek in a 24-week cycle.

This Addendum was incorporated into the parties' CBA. (See, Award at pg.4).

[6]As a procedural matter, FEMS argued that the grievance was not arbitrable on the basis of untimeliness, based on the fact that the Union did not file it's grievance until the new program had been in place for over a year. The Arbitrator dismissed this argument by finding that the Agency's action was a continuing violation; therefore, the time for filing a grievance had not expired. The Board concludes that this finding is reasonable and supported by the record.

In addition, FEMS relied on Federal Labor Relations Authority (FLRA) precedent for its argument that the Arbitrator's Award was in error because it abrogated a management right. See, Department of the Treasury, U.S. Customs Service and National Treasury Employees' Union (DOT and NTEU), 37 FLRA 309, 314 (1990). According to DOT and NTEU, an arbitration award abrogates a management right when the award precludes an Agency from exercising that management right. Furthermore, FEMS asserts that a management right cannot be waived or relinquished through collective bargaining. See, Southwestern Power Administration and International Brotherhood of Electrical Workers, Local 1002, 22 FLRA 475, 476 (1986). While this may be the case according the FLRA precedent, the Board has established that management may waive its right by consenting to bargain over an issue where it has no duty to. To explain further, there are three categories of subjects for bargaining pursuant to the CMPA. Those

(continued...)

authority to institute the change based on Managements' exclusive statutory right to set an employee's tour of duty[7] and maintain the efficiency of the government, pursuant to D.C. Code §1-617.08 (a)(4) and(5).

We have held that an Arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." D.C. Dept. of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). In addition, we have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 39 DCR 9628, Slip Op. No. 320 at p.2, PERB Case No 92-A-04 (1992). Also, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement and related rules and regulations as well as his evidentiary findings and conclusions upon which the decision is based." Id. Moreover, "[t]he Board will not substitute its own interpretation or that of the Agency's for that of the duly designated arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987).

In the present case, the Board finds that FEMS merely disagrees with the Arbitrator's decision and requests that we adopt its interpretation of the contract. However, as indicated above, we will not substitute our interpretation for that of the duly designated Arbitrator. In addition, we have held that a "disagreement with the arbitrator's interpretation. . . does not make the award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, Slip Op. No 413, PERB Case No. 95-A-02 (1995).

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[6](...continued)
categories include:(1) ***mandatory subjects***- over which parties must bargain; (2) **permissible subjects**-over which parties may bargain and (3) ***illegal subjects***- over which parties may not bargain. See, D.C. Public Schools and Teamsters Local 639 and 730, 38 DCR 2487, Slip Op. No. 273, PERB Case No. 91-N-01 (1991). While it is true that determining the tour of duty and the number of hours in a workweek and in a workday, are management's rights pursuant to the CMPA, management may choose to bargain over the subjects. As a result, these subjects become permissible subjects of bargaining where no section of the CMPA expressly prohibits bargaining over the issue. In the present case, FEMS chose to bargain concerning the number of hours that paramedics may work and memorialized their agreement with AFGE in an Addendum to the parties' CBA. As a result, the subjects became permissible subjects of bargaining because management waived its exclusive right to bargain over the issue. FEMS does not point to any language in the D.C. Code which prohibits bargaining over the subject of hours of work.

[7]FEMS relies on precedent which held that pursuant to the CMPA, Management has the exclusive right to determine an employee's hours of work and tour of duty.

The Board has stated that "to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000).

After reviewing FEMS's "contrary to law" argument, the Board finds that FEMS failed to cite any applicable law that has been violated.[8]

While FEMS correctly noted that establishing an employee's tour of duty and maintaining the efficiency of the government[9] are management's rights,[10] over which the Agency is not required to bargain, it failed to recognize that it waived its right to set the hours of work for paramedics when it negotiated and reached an agreement with AFGE limiting the hours of work to twelve (12)[11] . As a result, FEMS became bound by language that it negotiated and the Arbitrator found a violation of the CBA. (See, Award at pg. 56).

We find that the Arbitrator's conclusion is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. FEMS merely disagrees with the Arbitrator's conclusion. This is not a sufficient basis for concluding that the Arbitrator's Award is contrary to law or public policy. For the reasons discussed above, no statutory basis exists for setting aside the Award; the Request is therefore, denied.

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[8]This "contrary to law" argument is outlined in detail in footnote 6 of this Opinion.

[9]These Management's rights are codified at D.C. Code §1-617.08.

[10]In the present case, we are not dealing with proposals in a negotiations setting. Instead, FEMS had *already negotiated over the subject of hours of work and agreed to limit the number of hours that paramedics could work in a day to 12 hours*. It was a part of the CBA which the parties chose to have Arbitrator Donegan interpret. Because the Arbitrator found that FEMS scheduled paramedics for more than 12 hours a day, he determined that the Agency violated the CBA.

[11] As noted earlier, the Board has held and the D.C. Court of Appeals has affirmed that management has the right under the CMPA to determine an employee's Hours of Work, and that proposals by a union which seek to abrogate that right are non-negotiable. See, Drivers, Chauffeurs and Helpers Local Union No. 639, et.al. v. Public Employee Relations Board, 631 A.2d. 1205, 1211 (D.C. 1993) and D.C. Public Schools and Teamsters Local 639 and 730, 38 DCR 2487, Slip Op. No. 273, PERB Case No. 91-N-01 (1991). However, the Board has also held that a subject over which a party is not required to bargain may become a permissible subject of bargaining, if the Agency agrees to negotiate over the subject. See, Id.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Arbitration Review Request is denied.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

September 30, 2003

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 631,	PERB Case No. 02-U-19
Complainant,	Opinion No. 730
	FOR PUBLICATION
v.	
DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,	
Respondent.	

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, Local 631 ("Complainant", "AFGE" or "Union"), alleging that the District of Columbia Water and Sewer Authority ("Respondent", "WASA" or "Agency") violated D.C. Code §1-617.04 (a)(1) and (5) (2001 ed.). Specifically, AFGE alleges that WASA committed an unfair labor practice by: (1) failing to bargain, upon request, over Reduction-in-Force (RIF) procedures; (2) failing to bargain, upon request, over the impact and effects of new employer policies and changes to existing polices, procedures and practices; and (3) failing to produce documents upon request.[1]

[1] AFGE's Complaint makes the following specific claims. First, AFGE claims that WASA violated the CMPA by failing to bargain over RIF procedures. In addition, AFGE contends that WASA unlawfully refused to bargain over changes to the following: (1) Duty task lists; (2)Policies for Annual Leave, Sick Leave and Termination of Employment; (3) Neutral Party Process; (4) Sign In and Sign Out Policy and Record of Discussion Document; (5) Other Personnel Policies; (6) Evaluations; (7) Internal Improvement Plan ("IIP") at Blue Plains; (8) Minimum crew sizes, consolidation of facilities; (9) relocation of employees; (10) permitting contractors to take WASA certification classes; and (11) refusing to permit or making it difficult for bargaining unit members to take training. Finally, AFGE claims that WASA unlawfully

(continued...)

The Respondent denies the allegations. Specifically, the Respondent contends that it had no duty to bargain over RIF procedures because the Comprehensive Merit Personnel Act (CMPA) gives Agency Heads the exclusive authority to abolish positions through a RIF.[2] In addition, WASA claims that it informed the Union, in writing, of its position concerning negotiating over RIF procedures. WASA denies claims that the Agency implemented new or changed existing policies and procedures, without first the Union to opportunity to bargain over their impact and effects. In support of its denial, WASA claims and cites instances where it gave the Union opportunities to comment on the new policies and procedures and AFGE did not respond in the time specified. In addition, WASA also cites instances where the Union did not respond to its requests for clarification on policies it objected to. WASA also contends that it made no changes to the policies in many cases where the Union alleged that it did; rather, it merely updated the same language that had been used before. As to the document request, WASA contends that although there was some delay, it did provide the requested information to AFGE.[3]

A hearing was held, and the Hearing Examiner issued a Report and Recommendation (Report). In her Report, the Hearing Examiner found that AFGE failed meet its burden of proof as to any of the allegations raised. As a result, she recommended that AFGE's complaint be dismissed.

AFGE presented numerous exceptions[4] to the Hearing Examiner's Report. The Board will not list all of their Exceptions in this Opinion because many of them repeat the position that the Union argued unsuccessfully during the hearing. Furthermore, we find that some of the other exceptions

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[1](...continued)
refused to respond to an information request.(Complaint).

[2]In their filings, the Agency cites D.C. Code §1-615.07 (2001 ed.) as the relevant section of the D.C. Code ("Code") which gives the Agency the authority to refuse to bargain over RIF procedures. However, we found that the correct section of the code is D.C. Code §1-624.08, which provides, in pertinent part, that: " each agency head is authorized, within the agency head's discretion, to identify positions for abolishment." (2001 ed.).

[3]In FOP v. MPD, the Board also observed that "in the interest of advancing the collective bargaining process, the better approach, upon being faced with [such] an effective refusal to bargain over any aspect of management's decision, is [for the union] to then make a second request to bargain with respect to the specific effects and impact of the management decision." 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). However, the Board qualified that statement by indicating that "a second request to bargain is not required to establish a violation of the CMPA." Id at p. 4.

[4]AFGE's objections are outlined in detail in their document entitled "Complainant's Exceptions to Hearing Examiner's Report and Recommendation." (Exceptions).

disagree with: (1) the Hearing Examiner's analysis of the evidence; (2) the weight she gave certain testimony; (3) and her ultimate findings on those issues. However, the Board will address several of the key issues which we believe need to be addressed or need further clarification in the paragraphs that follow.

RIF Procedures

On the issue of RIF procedures, the Hearing Examiner was persuaded by WASA's argument that they had no obligation to bargain over procedures based on the fact that the CMPA gave the Agency's Department Head authority to abolish positions through RIFs. She also noted that the Union cited no authority to dispute WASA's claim. While the Board adopts the Hearing Examiner's conclusion that WASA had no duty to bargain over the RIF procedures, we reach our conclusion on a different basis.

In Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections[5], the Board expressly held that RIF procedures are non-negotiable. 49 DCR 11141, Slip Op. No. 692 at p.5, PERB Case No. 01—01(2002). We based our decision on a thorough review and analysis of the Omnibus Personnel Reform Amendment Act of 1998, which revised the previous RIF regulations and eliminated a provision which had allowed RIF policies and procedures to be appropriate matters for collective bargaining. See, Id. We believe that this Board precedent is applicable to the case presently before us. As a result, we find that Hearing Examiner's conclusion that the RIF procedures were not negotiable is reasonable, supported by the record, and consistent with the Board precedent noted above.

Internal Improvement Plan

In its Exceptions, AFGE argues the Hearing Examiner's denial of its request to recall Barbara Milton as a witness was in error and that it would have been able to provide information concerning the IIP allegation had Ms. Milton been able to testify.[6] AFGE elaborates and explains that "counsel for the Union inadvertently forgot to ask Ms. Milton questions concerning the unilateral changes arising out of the IIP, but sought to rectify the oversight at the end of the Union's case-in-chief by

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[5]In this Negotiability Appeal, FOP sought to have the Board find negotiable a proposal which altered RIF procedures. The Board declined to do so after making a determination that RIF procedures were no longer negotiable under the new law. See, Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections,49 DCR 11141, Slip Op. No. 692, PERB Case No. 01—01(2002).

[6] The Union argues that it would have offered evidence to support its allegations concerning WASA's IIP, but the Hearing Examiner improperly refused to allow a witness to be recalled before WASA started its case-in-chief. (See, Exceptions at pg. 6).

recalling Ms. Milton[7]."

The Board is not persuaded by this argument because after reviewing the transcript, we find that the Union had concluded its case-in-chief before seeking to reserve the right to recall Ms. Milton.[8] In addition, the Board's Rules give the Hearing Examiner broad authority to conduct hearings. See, Board Rules No. 550.12-550.14. In addition, we have held that a hearing is not tainted where parties have adequate opportunity to present evidence and argument. Pratt v. D.C. DAS, 43 DCR 1490, Slip Op. No. 457, PERB Case No. 95-U-06 (1996). We have also held that a Hearing Examiner has the authority to conduct a hearing and decide evidentiary matters. See, Id. and Mack, Lee and Butler v. FOP/DOC, 47 DCR 6539, Slip Op. No. 421, PERB Case No. 94-U-24 (2000). In the present case, by the Union's own admission, its Counsel forgot to present testimony concerning the issue during their case-in-chief, despite the fact that they had an opportunity to present evidence and argument on this matter. In view of the precedent listed above, we find that the Hearing Examiner's decision is consistent with Board precedent. Furthermore, we find that the Hearing Examiner's decision not to allow further testimony from Ms. Milton once the Union had rested its case-in-chief is reasonable and supported by the record. We have found that challenges to evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's finding. Hatton v. FOP/DOC Labor Committee, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (2000). As a result, we find that the Union's exception on to the Hearing Examiner's finding, that AFGE did not meet its burden of proof concerning changes to the IIP, lacks merit. Therefore, we adopt the Hearing Examiner's finding on this issue.

Document Production

In this Exception, AFGE claims that the Union is not required to demonstrate "bad faith" in order to prove that WASA violated D.C. Code §1-617.04 (a)(5) (2001 ed.) of the CMPA by refusing

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[7]The reference to Ms. Milton in this sentence refers to Barbara Milton, the Union's President.

[8]We find that the record reflects that Hearing Examiner asked the Union's counsel if she was finished with her case-in-chief and she indicated "yes". The Union's counsel later added that she might like to reserve the right to call Ms. Milton in terms of a couple of issues on the IIP. WASA's counsel objected to the Union being able to recall Ms. Milton to address those issues based on the fact that the Union had not raised IIP issues in its case in chief. (See, Exceptions at pg. 6 and Tr. at pgs. 165-166).

to provide the Union with the requested bargaining information."[9] (Exceptions at pg. 8). AFGE is correct in its assertion that the Board's precedent has not required that there be an affirmative showing of bad faith in delaying to produce documents before an unfair labor practice violation can be found.[10] Nevertheless, the Hearing Examiner's finding concerning the document production issues seems reasonable and supported by the record.

In the present case, the Hearing Examiner found that the documents were eventually produced and that the delay did not rise to the level of an unfair labor practice. The Hearing Examiner also looked at the course of dealing between these two parties and found that both parties had delayed responding to each other's requests on occasion. As a result, she concluded that AFGE had not met its burden of proof.

The Board has found that failing to timely produce document is an unfair labor practice where the delay was unreasonable. See, Doctors Council of D.C. General Hospital v. D.C. General Hospital, 46 DCR 6268, Slip Op. No. 482, PERB Case Nos. 95-U-10 and 95-U-18 (1996). In one such case where the Board found an unfair labor practice for failing to produce documents: (1) the Union had made two requests; (2) there was a six month delay in producing the documents; (3) and the Union had filed a Motion for Summary Judgement on the issue before the Agency produced the documents. In the present case: (1) the delay was over 3 months; (2) there had only been one request for the document; and (3) the documents were, in fact, produced.

In the present case, the Hearing Examiner concluded that the Complainant had not met its

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[9]The Union also argues that it had no obligation to request documents twice, as it claims the Hearing Examiner suggests in her decision. (Exceptions at pgs. 9-10). We also find no merit to this Exception. The Board finds that Hearing Examiner merely points to a prior decision by the Board which suggests that in the interest of labor relations, it may be better to request documents a second time when it is unclear as to whether the other party is refusing to produce them or refusing to bargain in good faith. See, Report at pg. 15 and International Brotherhood of Police Officers , Local 446 v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992). We do not read the Hearing Examiner's decision as requiring that AFGE request the documents twice. Instead, she suggested that "where there has not been a negative response, but a somewhat vague and delayed communication", it may be helpful to make a second request. (Report at pg.15). In this case, there was a delay in producing the documents, and they were eventually produced. She suggests that a second request may have made WASA's position more clear. (See, Report at pg. 15). Therefore, we do not find that the Hearing Examiner erred in making this suggestion.

[10] In finding that no unfair labor practice was committed, the Hearing Examiner stated that "the delay in responding is in excess of three months." While significant, it is not, standing alone, sufficient to establish bad faith on the part of WASA." (See, Report at 15).

burden of proof in showing that the Respondent refused to bargain in good faith concerning this matter. In view of these facts and the Board precedent noted above, we find that the Hearing Examiner's conclusion that WASA's conduct did not rise to the level of an unfair labor practice seems reasonable, although her suggestion that "bad faith" needed to be shown is not an accurate statement of the Board's standard. Therefore, in this Opinion, we seek to clarify the standard by noting that a showing of bad faith is not required in order to find a ULP; rather, the Complainant's must show that the delay was unreasonable and that the Respondent failed to produce the documents in a timely manner.

As to the other Exceptions raised in AFGE's Exceptions, we find that they lack merit and merely represent a disagreement with the Hearing Examiner's findings.

After reviewing the record in the present case, we find that the Hearing Examiner's findings, are reasonable and supported by the record, in view of the clarifications noted above. Additional review of the record reveals that the Agency's Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where the findings are fully supported by the record. American Federation of Government Employees, Local 874 v. D. C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). The Board has also rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. American Federation of Government Employees, Local 2741 v. D. C. Department of Recreation Parks, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999). On this basis, we conclude that the Union's Exceptions lack merit. Therefore, we adopt the Hearing Examiner's finding that WASA did *not* commit an unfair labor practice in this matter. In doing so, we clarify the Board's precedent on an unfair labor practice based on a party's failure to produce documents, as noted above. We also clarify and incorporate the Board's precedent and position that there is no duty to negotiate over RIF procedures..

Since we have adopted the Hearing Examiner's finding that WASA did not violate the CMPA, we dismiss AFGE's Complaint in its entirety.

Pursuant to D.C. Code §1-605.02(3) (2001 ed.) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and for the reasons discussed above, we adopt the Hearing Examiner's findings, with the clarifications mentioned above.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint filed by the American Federation of Government Employees, Local 631, against the District of Columbia Water and Sewer Authority (WASA), is dismissed.

2. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

September 30, 2003

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
FRATERNAL ORDER OF POLICE/ METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE,	PERB Case Nos. 02-U-11 and 02-U-14
Complainant,	Opinion No. 736
v.	FOR PUBLICATION
DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT,	
Respondent.	

DECISION AND ORDER

This case involves an unfair labor practice complaint[1] filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Complainant", "FOP", or "Union") alleging that the District of Columbia Metropolitan Police Department (" Respondent", "MPD", or "Department") violated D.C. Code §1-617.04 (a)(5)(2001ed.).[2] Specifically, FOP asserts that MPD committed an unfair labor practice by refusing to engage in impact and effects bargaining with FOP concerning a: (1) reorganization[3] and (2) Memorandum of Agreement (MOA) involving changes to the "use of force" policies and procedures at the Department.

The Respondent denies the allegations. In addition, MPD claims that FOP's complaints were not timely filed and should be dismissed.

[1]PERB Case Nos. 02-U-11 and 02-U-14 were consolidated.

[2]Throughout this Opinion, all references to the D.C. Code are to the 2001 edition.

[3] FOP contends that MPD unilaterally reorganized its Special Investigations Division (SID) of the Office of the Superintendent of Detectives without providing it with the opportunity to negotiate over the impact that the changes would have on the members' terms and conditions of employment. SID controls the assignment of investigators and detectives within MPD. FOP concedes that it agreed not to request impact bargaining concerning the reorganization of the homicide unit. However, FOP argues that the Union did not request impact bargaining because it was unaware that the changes impacted on the assignment of overtime and discipline.

The Hearing Examiner found that the complaints in both PERB Case Nos. 02-U-11 and 02-U-14 were untimely filed and; therefore, should be dismissed.[4] Furthermore, on the merits of PERB Case No. 02-U-11, she found that FOP did not meet its burden of showing that MPD violated the Comprehensive Merit Personnel Act (CMPA). However, on the merits of PERB Case No. 02-U-14, the Hearing Examiner found that MPD : (1) had a duty to bargain over the impact and effects of the MOA and (2) did, in fact, refuse to bargain. Nevertheless, she was constrained to recommend that the complaint be dismissed because FOP did not file its complaint in a timely manner.[5]

FOP filed exceptions to the Hearing Examiner's Report and Recommendation. The Hearing Examiner's Report and Recommendation (R& R), FOP's Exceptions and MPD's Opposition are now before the Board for disposition.

ISSUES PRESENTED:

1. Were these unfair labor practice complaints timely filed?

2. Did FOP meet its burden of proving that MPD unlawfully refused to bargain over the

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[4] In addition, the Hearing Examiner made findings on several preliminary issues which are challenged by both parties. Although not discussed at length in this Decision and Order, we adopt the Hearing Examiner's ruling to exclude witnesses, where MPD did not submit a witness list in a timely manner pursuant to the Board's Rules. In addition, we adopt the Hearing Examiner's finding that FOP's challenged documents should be admitted, despite the fact that they were not submitted within the time period indicated by the Board's rules. Board Rule 550.7 states that " any party intending to introduce documentary exhibits at a hearing shall make every effort to furnish a copy of each proposed exhibit to each of the other parties at least five (5) days before the hearing."

The Hearing Examiner interpreted the rule concerning exchanging documents prior to the hearing, as being permissive and not mandatory. In addition, she considered the fact that both parties exchanged their documents at the same time, even though neither party met the five (5) day requirement of Rule 550.7. (See, R & R at p.5). The Hearing Examiner did not credit MPD's argument that its documents should be accepted and FOP's should not because FOP's documents were ten pages and MPD's were only one or two pages each. The Hearing Examiner did not find the number of pages to be relevant. Therefore, she found no basis to exclude the documents. In our view, the Hearing Examiner's rulings were reasonable and consistent with Board Rules 550.7 and 550.11. Therefore, we adopt the Hearing Examiner's rulings on the documents and witnesses.

[5]This was the case even after MPD demonstrated a clear refusal to negotiate over the MOA.

impact and effects of changes in either matter?

DISCUSSION:

PERB Case No. 02-U-11

The Hearing Examiner found that FOP did not file its complaint within the 120-day time period required by Board Rule 520.4. [6] As a result, she recommended that the complaint be dismissed. In concluding that the complaint was untimely filed, she observes that there are references to the Union's awareness of the changes in the Special Investigative Division as early as October[7] and November of 2001.[8] Despite FOP's assertion that it did not know the "full extent of the reorganization," the Hearing Examiner found that FOP knew that the authority would be centralized, and thus, discipline and assignment of overtime would reasonably be anticipated to be part of the centralized process. (R & R at pg. 7). Therefore, the Hearing Examiner determined that the Complaint was untimely filed based on her finding that FOP knew about the changes as early as October or early November.

FOP contends that the Hearing Examiner's finding that the Union's complaint was untimely filed is incorrect because it is based on an oversight. FOP disputes the contention "that an employer's mere intention to implement an unnegotiated change in working conditions is sufficient to trigger the jurisdictional time limit for filing a ULP complaint." Furthermore, FOP asserts that, even if the Hearing Examiner was correct in determining that the Union should have filed its complaint earlier, she miscalculated the 120-day filing period.

In the present case, the Union filed its complaint on February 15, 2002. According to the Hearing Examiner's calculations, FOP missed the 120-day deadline by filing its complaint on February 15, 2002. Specifically, FOP argues that: "[e]ven if the 120-day clock for filing the ULP commenced

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[6] The Hearing Examiner's Report in this matter did not specify any definite start date for her timeliness computation. She merely mentions that the Union had knowledge of the proposed changes as early as October or November of 2001.

[7]There is also a reference to a meeting in October 2001. In her report, the Hearing Examiner notes a letter dated October 29, 2001 from Assistant Chief of Police Gainer to Chairman Neill which references a meeting a week earlier and mentions information regarding investigators. (R & R at pg. 6).

[8]The parties negotiated over the impact of the proposed changes and reached an agreement on November 2, 2001.

in late October or early November 2001, as the Hearing Examiner's analysis suggests, the February 15, 2002 ULP complaint was timely filed." (Exceptions at pg.6). Therefore, FOP contends that the Hearing Examiner's finding that the Complaint was untimely filed is based on a computational error. (Complainant's Exceptions at pg. 6).

MPD contends that FOP knew about the changes at MPD and requested to bargain over the changes as early as April 2001[9]. As a result of the bargaining, the parties reached an agreement in November 2001. Pursuant to the parties' agreement, FOP agreed not to file an Unfair Labor Practice Complaint concerning, *inter alia*, the current investigator selection examination and process. MPD agrees with the Hearing Examiner's conclusion that FOP's filing was untimely, and notes that "regrettably, the Hearing Examiner is not specific as to how she arrives at the conclusion that the filing was untimely." (Respondent's Exceptions at pg. 6). However, MPD claims that the Hearing Examiner used the wrong date when calculating the 120-day time period. MPD claims that the Hearing Examiner erred by using the original filing date (February 15, 2002), instead of the date that FOP actually cured its deficiencies (April 9, 2002). Using the November date as the start date and the April filing date as the end date, MPD contends that FOP actually filed its complaint within approximately 158 days, instead of within 120 days. As a result, MPD argues that the filing is untimely.

Board Rule 520.4 provides that unfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred. The Board has interpreted Board Rule 520.4 to require that a Complainant file a complaint within 120 days after the Complainant becomes aware of the events giving rise to the allegations. Forrester v. American Federation of Government Employees, Local 2725 and District of Columbia Housing Authority, 46 DCR 4048, Slip Op. No. 577, PERB Case No. 98-U-01 (1991). The Board has also held that Board Rule 520.4 is mandatory and jurisdictional. See, Hoggard v. D.C. Public Schools, AFSCME Council 20, Local 1959, 43 DCR 1297, Slip Op. No. 352 (1993), *aff'd sub nom.*, Hoggard v. Public Employee Relations Board , MPA-93-33 (Super. Ct. 1994), aff'd, 655 A 2d. 320 (DC 1995). See also, Rush and Pugh v. International Brotherhood of Teamsters, Local 1714 and D.C. Department of Corrections, 46 DCR 9387, Slip Op. No. 367, PERB Case No. 92-U-10. (1999).

After reviewing this matter, we find that the Hearing Examiner miscalculated the 120 days. [10] Using November 2, 2001[11] (date of agreement) as the start date and February 15, 2002, as

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[9]MPD points to evidence in the record that FOP requested to bargain over investigator selection process by letter on April 13, 2001. (Respondent's Exceptions at pg. 6)

[10]The Hearing Examiner determined that FOP knew of the changes as early as October or early November, based on language in the November 2, 2001 agreement. However, as noted earlier, the Hearing Examiner's report was not specific concerning how she calculated the 120 day (continued...)

the end date, we find that the Complaint was filed in less than 120 days.[12] Based on our calculations, we find that approximately 105 days elapsed between the date that the Hearing Examiner determined that FOP had notice of the decentralization changes (November 2001) and the filing date. (See, R & R at pg. 7). Therefore, we conclude that the complaint in PERB Case No. 02-U-11 was timely filed. As a result, we reject the Hearing Examiner's finding that this matter was not timely filed.

Notwithstanding her finding that the Complaint was untimely, the Hearing Examiner found that this matter should be dismissed because FOP did not meet its burden of showing that MPD refused to bargain. In making this determination, the Hearing Examiner reviewed the last correspondence from Chief Ramsey in February 2002, in which MPD indicated that it refused to rescind the action it had taken (reorganization), but agreed to engage in impact bargaining as soon as the Union submitted its proposals. Since there was *no* evidence in the record that FOP submitted proposals, the Hearing Examiner found that FOP did *not* meet its burden.

FOP argued that it did not submit proposals in response to MPD's letter because it did not know the "full extent of the reorganization."[13] Furthermore, FOP asserts that "good faith bargaining was not possible where the Agency had already implemented the reorganization and had officially

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[10](...continued)
time period.

[11]It is not clear from the Hearing Examiner's Report and Recommendation what date she actually began counting the 120 days. She did not give a specific date on which she based her calculations, but merely mentioned October and early November as potential starting dates for her calculations. However, we have determined that November 2, 2001 should be the start date to compute the 120 day requirement of Board Rule 520.4. As noted earlier, November 2, 2001 is the date that the MPD and FOP reached an agreement concerning the proposed changes.

[12]Consistent with the D.C. Superior Court's Decision in D.C. Metropolitan Police Department v. D.C. Public Employee Relations Board, once a deficiency is cured in a filing, the document's official filing date is its original filing date. CA No. 98-MPA-16 (1999).

[13]The Hearing Examiner rejected this argument and noted that even if FOP did not know the full extent of the reorganization, it did know that discipline and overtime were problems, and could have responded with proposals on those two issues, but did not. She also observed that there was no evidence presented that the Union made any effort to obtain any additional information on the new reporting system or that its efforts were in any way stymied by MPD.

refused to rescind the reorganization of SID/OSD." [14] (Exceptions at pgs. 6 and 7). FOP also takes exception to the Hearing Examiner's finding on this issue because the Hearing Examiner did not address this specific argument made in FOP's post-hearing brief in her decision.

In response to FOP's argument concerning good faith bargaining not being possible where the change has been implemented, MPD asserts that FOP improperly relied on Federal law, and that the Board's precedent should control this issue. MPD then cites Board precedent which held that *status quo ante relief* is generally inappropriate to redress an alleged violation of the duty to bargain over the impact and effects of a management right decision. Furthermore, MPD asserts that the reorganization was properly made pursuant to specifically enumerated management rights found in D.C. Code §1-617.08 (2001 ed.).

Management rights under D.C. Code §1-617.08 do not remove the obligation to bargain over the impact, effects, and procedures concerning the implementation of those management rights. American Federation of Government Employees, Local 383 v. D.C. Department of Human Services, 49 DCR 770, Slip Op. No. 418, PERB Case No. 94-U-09 (2002). The Board has held that unions enjoy the right to engage in impact and effects bargaining concerning a management right decision, only if they make a timely request to bargain. University of the District of Columbia Faculty Association/ NEA v. UDC, 29 DCR 2975, Slip Op. No. 43, PERB Case No. 82-N-01. (1982). The Board has also held that there is *no* duty to bargain over the impact and effects of a management right decision unless and until management decides to implement a change. See, Fraternal Order of Police/MPD v. D.C. Metropolitan Police Department, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000) and American Federation of Government Employees, Local 872 v. D.C. Department of Public Works, 49 DCR 1145, Slip Op. No. 439, PERB Case Nos. 94-U-02 and 94-U-08 (1995). Moreover, an Employer does not bargain in bad faith by merely unilaterally implementing a management right. The violation arises from the failure to provide an opportunity to bargain over the impact and effects once a request is made. Fraternal Order of Police/MPD v. D.C. Metropolitan Police Department, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). After a timely request is made, an Agency must bargain before implementing its reserved decision. Id.

The record demonstrates that FOP made a request to bargain and had an opportunity to bargain over the issue, as evidenced by MPD's February 11, 2001 correspondence to the Union. Furthermore, in response to FOP's argument that there cannot be meaningful bargaining where a

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[14]FOP relies on National Labor Relations Board (NLRB) precedent to support its position. In Soule Glass & Glazing Co. V. NLRB , 462 F 2d 1055, the NLRB held that "good faith bargaining requires timely notice and a meaningful opportunity to bargain regarding the employer's proposed changes in working conditions, since no genuine bargaining can be conducted where the decision has already been made and implemented." See, Id.

decision has already been made to implement a change, we are not persuaded.[15] FOP was given an opportunity to bargain, but did not take it. Instead, FOP did not respond to MPD, or submit proposals.

In view of the above, the Board concludes that the Hearing Examiner's finding that FOP did *not* meet its burden in showing that MPD refused to bargain is reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's finding that FOP did *not* meet its burden of proof in showing that MPD refused to bargain concerning the reorganization. As a result, we find that the Complaint in PERB Case No. 02-U-11 should be dismissed because it fails to state a cause of action.

PERB Case No. 02-U-14

The Hearing Examiner found that the Respondent's refusal to bargain over the MOA was clearly stated in its July 6, 2001 letter to the Union. As a result, she found that pursuant to PERB Rule 520.4, FOP had 120 days from the July 6th date to file its unfair labor practice complaint. [16] Therefore, she recommended that the complaint be dismissed as untimely filed.

In its Exceptions, FOP argues that it did not immediately file an unfair labor practice complaint against MPD when it first learned of the MOA[17] because FOP hoped that the parties would be able to meet and reach an agreement concerning the changes contained in the MOA. In addition, FOP contends that instead of rushing out and filing an unfair labor practice charge after

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[15]In our view, it was premature for FOP to conclude that there could not be any meaningful bargaining over a proposed change where FOP did not take any steps to bargain with MPD once they agreed to bargain. Furthermore, we find that the Soule Glass & Glazing Co. v. NLRB, cited by FOP, is inapplicable to the facts in the case presently before us. 462 F. 2d 1055. Furthermore, the Board is not bound by NLRB precedent. The Board's precedent requires that an Agency give the Union notice and the opportunity to bargain over changes once the Union makes its request. See, Fraternal Order of Police/MPD v. D.C. Metropolitan Police Department, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). This opportunity to bargain was given, but FOP declined to bargain. Therefore, we conclude that MPD did not commit an unfair labor practice in this case.

[16] In making this decision, she also considered the fact that FOP officials: (1) knew about the MOA as early as January 2001; (2) saw it in June 2001; (3) had requested to bargain over it several times and; (4) were told definitively in a July 6, 2001 letter that MPD would not bargain over the MOA.

[17]FOP asserts that it first learned of the MOA in January 2001, but did not actually see the MOA until June 2001. (See, R & R at pg. 8).

receiving Chief Ramsey's July 6th letter, it chose to take a "more conservative and measured approach." (Exceptions at pgs.3-5). Therefore, FOP assigned someone to monitor the changes that were being implemented pursuant to the MOA. In addition, FOP decided to reiterate and refine the Union's position with respect to that policy.

FOP eventually filed its Complaint on March 7, 2002. FOP also asserts that it believed that filing the Complaint sooner would have been premature. FOP relies on Board precedent for the proposition that a complaint is premature based on a proposed, but unimplemented change in working conditions.[18] Furthermore, FOP relies on Board precedent for its argument that "management violates its statutory duty to bargain when it implements a management decision in the face of a timely union request to bargain over the impact and effects." (Exceptions at pg. 3); NAGE v. DCWASA, 47 DCR 7551, 7556-57, Slip Op. No. 635, PERB Case No. 99-U-04 (2000).

In response, MPD argues that on July 6, 2001, the Chief refused to bargain. However, FOP did not file its complaint until March 7, 2002. Therefore, MPD asserts that FOP exceeded the 120 day limit by waiting until March 7, 2002 to file the complaint, despite the fact that the Chief's refusal to bargain notice came on July 6, 2001. Therefore, MPD contends that the Complaint should be dismissed.

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[18] In support of this claim, FOP relies on Fraternal Order of Police/MPD Labor Committee v. D.C. Metropolitan Police Department, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). In this case, the Board held that if an employer decides not to implement or suspends implementation of a management right decision, no duty to bargain over its impact and effect exists. Under the facts of FOP/MPD Labor Committee v. D.C. MPD, the Board found it premature to conclude that MPD had violated the Comprehensive Merit Personnel Act by failing to bargain over the impact of a proposed, but unimplemented change. 47 DCR 1449, Slip Op. No. 607 at pg. 4, PERB Case No. 99-U-44 (2000). In the present case, the Board notes that the problem with FOP's argument is that the Union filed its complaint over a year after it heard of the MOA and eight months after MPD clearly refused to bargain over the MOA. Therefore, we conclude that this complaint is untimely.

FOP also makes an argument that this matter is timely based on a continuing violation theory. However, the record shows that it was clear that some of the policies contained in the MOA were being implemented as early as June of 2001, as evidenced by language in the MOA. Furthermore, the record demonstrates that FOP was aware that some of the policies were being implemented. However, FOP did not file its complaint until approximately nine months after the MOA was signed. As a result of FOP's delay in filing, we do not find FOP's continuing violation argument persuasive. Therefore, we conclude that this argument is a mere disagreement with the Hearing Examiner's finding. Furthermore, we conclude that FOP had a duty to file this complaint once it learned of the MOA being implemented, and at the very latest, when it learned that Chief Ramsey had refused to bargain over the matter in his July 6, 2001 letter.

After reviewing this matter, we conclude that the Hearing Examiner's finding of untimeliness concerning this complaint is reasonable and supported by the record. In the present case, FOP received a clear refusal to bargain over the MOA in July of 2001, but did *not* heed the refusal and did not file its complaint until March of 2002. The Board acknowledges that FOP's efforts in attempting to foster good labor management relations with MPD by not filing the complaint are noble. However, this time lapse is well beyond the 120-day filing period mandated by the Board's Rules. Furthermore, as noted earlier, the Board has held that time limits for initial filings such as complaints are mandatory and jurisdictional. See, Hoggard v. D.C. Public Schools, AFSCME Council 20, Local 1959, 43 DCR 1297, Slip Op. No. 352 (1993), *aff'd sub nom.*, Hoggard v. Public Employee Relations Board, MPA-93-33 (Super. Ct. 1994), aff'd, 655 A 2d. 320 (DC 1995). See also, Rush and Pugh v. International Brotherhood of Teamsters, Local 1714 and D.C. Department of Corrections, 46 DCR 9387, Slip Op. No. 367, PERB Case No. 92-U-10. (1999). As a result, we find that the filing of PERB Case No. 02-U-14 was not timely. Therefore, we adopt the Hearing Examiner's recommendation that this matter be dismissed.

Notwithstanding the finding of untimeliness, the Hearing Examiner found that MPD clearly had a duty to bargain over the impact and effects of the MOA, as it affected terms and conditions of employment. In making this finding, she relied on Board precedent which held that the "impact of a non-bargainable management decision upon the terms and conditions of employment is bargainable upon request." International Brotherhood of Teamsters, Local Unions No. 639 and 730 v. D.C. Public Schools, 37 DCR 1806, Slip Op. No. 39, PERB Case No. 89-R-16 (1990) and (R & R at pg. 9). The violation of the duty to bargain is based upon management's refusal or failure to bargain once the request is made. See, American Federation of Government Employees, Local 383 v. D.C. Department of Human Services, 49 DCR 770, Slip Op. No. 418, PERB Case No. 94-U-09 (2002). Nevertheless, in this case, the Hearing Examiner was constrained to dismiss the matter based on the fact that FOP did not file its complaint in a timely manner, even after MPD gave FOP a clear refusal to bargain over the MOA.

In its exceptions, FOP argues that MPD clearly had a duty to bargain pursuant to the Board precedent cited above. In addition, the Union explained that its delay in filing the complaint was justified because it was lead to believe that MPD would negotiate based on the union's interaction with Department officials, namely Executive Assistant Chief Gainer. Furthermore, the Union asserts that it did not rush to file a complaint because it wanted to foster good labor management relations with MPD.

MPD asserts that its position was clear that it did not intend to bargain over the MOA and FOP was required to file within the 120 day time period, despite its hope that MPD would come to the table. Finally, MPD contends that any hope that MPD would come to the table should have been extinguished by Chief Ramsey's July 6, 2001 letter to the Union refusing to bargain over the MOA.

The Hearing Examiner made a finding that MPD had a duty to bargain over the MOA and its use of force policies and procedures. However, she determined that MPD *cannot* be found to have committed an unfair labor practice in this instance, because FOP's Complaint was not timely filed. Therefore, she recommended that the complaint in this matter be dismissed.

We find that the Hearing Examiner's finding and recommendation concerning this matter is reasonable, supported by the record and consistent with Board precedent. As a result, we adopt the Hearing Examiner's finding and recommendation in this matter. Therefore, we dismiss PERB Case No. 02-U-14.

Pursuant to D.C. Code §1-605.02(3) (2001 ed.) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and for the reasons discussed above, we reject the Hearing Examiner's finding that PERB Case No. 02-U-11 was untimely. However, we find that this case should be dismissed because FOP did not meet its burden of proving that MPD refused to bargain. In addition, we adopt the Hearing Examiner's finding that PERB Case No. 02-U-14 should be dismissed on the basis of untimeliness. Furthermore, we reject all other exceptions made by FOP's which are not discussed in detail in this Opinion, with the exception of its argument regarding the timeliness of PERB Case No. 02-U-11.[19] Therefore, we adopt the findings of the Hearing Examiner to the extent that they are consistent with this Opinion. as a result, we dismiss this Complaint in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The consolidated complaint in PERB Case Nos. 02-U-11 and 02-U-14 is dismissed.

2. Pursuant to Board Rule 559.1, this Decision and Order shall be final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

October 15, 2004

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[19]We find that FOP's's Exceptions amount to a mere disagreement with the Hearing Examiner's findings. The Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where the findings are fully supported by the record. American Federation of Government Employees, Local 872 v. D. C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 383,	PERB Case No. 02-U-16
	Opinion No. 753
Complainant,	FOR PUBLICATION
v.	
DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH,	
Respondent.	

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, Local 383 ("Complainant", "Union" or "AFGE"), alleging that the District of Columbia Department of Mental Health ("Respondent", "Agency" or "DMH") violated D.C. Code §1-617.04 (a)(1) and(5) (2001 ed.)[1]. Specifically, it is alleged that DMH committed an unfair labor practice (ULP) by failing to bargain, upon request, over the impact and effects of changes to employees' working conditions, including hours of work, shift schedules, and policies concerning use of personal vehicles to perform work related duties. In addition, it is alleged that the Respondent announced and implemented unilateral changes to matters affecting mandatory subjects of bargaining.

The Respondent denies the allegations. The Respondent claims that the Management Rights provisions of the Comprehensive Merit Personnel Act[2] (CMPA) authorize it to take the actions that

[1]In this Decision and Order, all references to the D.C. Code refer to the 2001 edition, unless noted otherwise.

[2] D.C. Code § 1-617.08(a)(5) (2001 ed.) provides, *inter alia*, that management has the right to determine the Agency's mission, budget, organization, as well as the number, type, grade, position, and tour of duty held by employees.

it did. Namely, DMH contends that pursuant to D.C. §1-617.08 (a)(5), it exercised its right to: (1) provide mental health care which complied with the Mental Health standards required pursuant to the Mental Health Rehabilitation Services Standards (MHRS), and, *inter alia*; (2) determine the Agency's mission, budget, organization, as well as the number, type, grade, position, and tour of duty held by employees in order to ensure the efficient operation of the Department. Additionally, the Agency contends that the present case should be dismissed because: (1) it failed to state a claim upon which PERB could grant relief; (2) the Agency has not implemented any changes which violate any statute, nor are they inconsistent with the collective bargaining agreement (cba); and (3) the matter was not the appropriate subject for a ULP, but rather should be addressed through collective bargaining negotiations. Also, the Agency denies that the Union was not given advance notice of the changes.

A hearing was held and the Hearing Examiner issued a Report and Recommendation. (R&R). The Hearing Examiner found that the Respondent violated D.C. Code §1-617.04 (a)(1) and (5).[3] Specifically, the Hearing Examiner found that these changes involved decisions that were made pursuant to management rights; therefore, the Agency was required to engage in impact and effects bargaining upon request.[4] As a result, she recommended that the Board: (1) issue an order directing the parties to immediately engage in impact and effects bargaining on an expedited schedule, to the extent that any impact can be ameliorated; (2) order the Respondent to post a notice that it committed an unfair labor practice; and (3) award costs to the Complainants. Furthermore, the Hearing

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[3]A threshold issue was raised concerning whether the Board has jurisdiction to hear a complaint filed by a Union that has joint certification where the "companion" union that shares the certification is *not* joined in the case as a party. AFGE, Local 383 shares a joint certification with AFSCME, Local 2095; however, AFSCME, Local 2095 is not joined as a party in this matter. The Hearing Examiner found that both jointly certified unions do not have the same issues, concerns, and circumstances, because they were not treated the same way by the Respondent. As a result, the Hearing Examiner found that joinder by AFSCME, Local 2095 is not required for AFGE to proceed with the present Complaint. The Hearing Examiner also noted that the Respondent did not provide any authority or documentation to support its claim that a joinder is a necessary element for filing the ULP in the present case. The Board concludes that the Hearing Examiner's finding on this issue is reasonable and supported by the record. As a result, we adopt the Hearing Examiner's finding on this threshold issue.

[4] The Board has held that it is well settled that management has certain statutory rights that it may exercise at its discretion. See, American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority, 47 DCR 7203,7206, Slip Op. No. 630, PERB Case No. 00-U-19 (2000) and American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority, ___DCR____, Slip Op. No. 702, PERB Case No. 00-U-12 (2003). However, it is also well settled that management must bargain, upon request, over the impact and effects of its decisions pursuant to these reserved rights. See, Id.

in bargaining. The Hearing Examiner also noted that there *may* be some compensation issues to be resolved in the matter concerning the alleged non-payment of employees for overtime and on-call status.[5]

The Complainant filed limited Exceptions concerning the Hearing Examiner's R & R. The Hearing Examiner's R&R and the AFGE's exceptions are before the Board for disposition

Facts:

This dispute arose out of actions which occurred at the Department of Mental Health (DMH), an Agency which was formerly under Receivership and known as the Commission on Mental Health Services. Specifically, in November 2001, DMH issued regulations pursuant to a March 28, 2001 court ordered plan and the Mental Health Service Delivery Reform Act of 2001. These regulations contained standards that were required to be met by all DMH-certified mental health rehabilitation service providers. (R & R at pg. 2). The regulations, known as the Mental Health Rehabilitation Standards (MHRS), required the DMH Community Service Agency (CSA) to implement various changes in its operations in order to meet the newly imposed certification standards. Several of the required changes directly affected employees who were members of AFGE. Two significant changes were that CSA employees were to provide extended hours and be on-call more than usual. As a result, employees would be required to provide 24 hour on-call services, 7 days a week. Respondent, DMH, met with various union representatives on an individual basis to discuss changes that the new regulations would impose on CSA and its employees. The Complainant's companion Union, AFSCME, Local 2095, was invited to a January 15, 2002 meeting, but the Complainant was not. However, one of AFGE's shop stewards, learned of the meeting with AFSCME, Local 2095, and attended it despite the fact that AFGE was not invited.

On March 14, 2002, a follow-up meeting, convened by the CSA's Chief Executive Officer and other Agency managers, was held with representatives of various unions in attendance. The

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[5] In her Report and Recommendation, the Hearing Examiner states the following:

> Perhaps PERB should retain jurisdiction in this matter while the parties engage in bargaining. It appears (that) there *may* be some compensation issues to be resolved in the matter of the alleged non payment of employees for overtime and on-call status. (R & R at pg. 31).

Since the Hearing Examiner made no specific findings on the issue of the alleged non-payment of overtime and on-call status, the Board will not address the matter concerning the alleged non-payment of overtime and on-call status in this Decision and Order.

March 14th gathering, referred to as the "Consultation Meeting with Labor Leadership", was attended by AFGE's President, Johnny Walker, Shop Steward Rosalyn Williams and Sheila Wiggins Williams. Proposed changes were announced at this meeting.

On March 19, 2004, DMH sent correspondence to the Unions notifying them that their comments at the March 14th meeting had been taken under advisement. (R & R at 4). The correspondence also solicited information concerning "the impact the (proposed) changes will have on your members, along with suggested resolutions to each impacted area identified." (R & R at pg. 4). The Unions were given three days to respond. On March 22, 2004, the same day that the Unions' responses were due, DMH issued a letter to Union leaders identifying changes that would be made to employees' work schedules, effective May 1, 2002. Nate Nelson, an AFGE National Representative, requested to bargain over the impact and effects of the proposed changes by letter dated April 18, 2002. DMH did not respond to Mr. Nelson's request until June 4, 2002.

DMH's Human Resources Director responded to AFGE's Local President and informed him that he had missed the March 22nd deadline for submitting comments and offered him another opportunity to contribute to the changes at CSA. DMH's Human Resource Director offered to meet from 10:00 a.m.-12:00 Noon on Thursday, June 10th to discuss the matter. However, Mr. Walker did not attend the meeting.

On July 16, 2002, National Representative Nate Nelson made a second demand to bargain over the impact and implementation of changes in working conditions. On July 25th, DMH's Human Resources Director acknowledged that they had demanded impact and effects bargaining, but denied that the Agency had made unilateral changes to the working conditions of AFGE members. She explained that all changes were mandated by the MHSDA and the Court Ordered plan pursuant to the Dixon v. Williams case, CA No. 74-285. The Respondent also indicated that it was "amenable to giving you (the Union) yet another opportunity to discuss the matter", if AFGE was willing to hold the ULP hearing scheduled for August 28, 2002 in abeyance. (See, R & R a t pgs. 2-5).

As a result of DMH's alleged failure to bargain over the impact and effects of these changes, AFGE filed this complaint.

The Hearing Examiner's Report and Recommendations and AFGE's Limited Exception:

Based on the pleadings, the record developed in the hearing and the parties' post hearing briefs, the Hearing Examiner identified the following issue and addressed the following sub-issues in this case:

1. *Whether the Respondent violated the CMPA by failing to bargain over the impact and effects of its changes to: (1) hours of work; (2) on-call policy; and (3) policy concerning use of personal vehicles ?*

A. Did the Respondent provide sufficient prior notice and ample opportunity to bargain over the impact and effects of the operational changes within the CSA?

B. Did the Complainant fail to properly request (or engage in) impact and effects bargaining on behalf of its members?

The Hearing Examiner determined that the Respondent violated the CMPA by failing to bargain over the impact and effects of its changes in the hours of work, on call policy and policy concerning the use of personal vehicles to perform work related duties. Relying on Board precedent, the Hearing Examiner noted that management's rights under D.C. Code §1-617.08 (a), do not relieve an Agency of its obligation to bargain with the exclusive representative of its employees over the impact or effects of, and procedures concerning the implementation of these management right decisions. See, American Federation of Government Employees, Local No. 383, AFL-CIO v. District of Columbia Department of Human Services, 49 DCR 770, Slip Op. No. 418, PERB Case No. 94-U-09 (2002). Thus, the Hearing Examiner determined that while the Agency in the present case may have "had a managerial right to implement operational changes in order to comply with the statute," there was also an obligation to bargain with the Union regarding the impact and effects of those changes.(R & R at p. 19). See, International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 41 DCR 2321 Slip Op. No. 312, PERB Case No. 91-U-06 (1992), *aff'd sub nom.,* District of Columbia General Hospital v. Public Employee Relations Board and International Brotherhood of Police Officers, Local 446, MPA 92-12 (1993) ; International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992) (R & R at pg. 21).

Although the Hearing Examiner found that the Agency had given sufficient notice of the proposed operational changes before they were implemented, she also found that DMH did *not* provide an ample *opportunity to bargain* over the impact and effects of these changes. Based on the facts in the record, the Hearing Examiner was persuaded that DMH gave the Union the opportunity to give "input", "discuss", and did in fact "request input" concerning the impact and effects of the changes. (R & R at pg. 20). However, the Hearing Examiner relied on the Board's precedent in several cases which support the proposition that meeting with the Union to receive its "input" is not sufficient to fulfill the duty and meet the standard for bargaining over the impact of a management

right. [6] See, International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992); See also, Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). See also, Fraternal Order of Police/DOC Labor Committee v. Department of Corrections, 49 DCR 8937, Slip Op. No. 679, PERB Case No. 00-U-36 and 40 (2002). As a result, she concluded that the Respondent in the instant case had a statutory duty under D.C. Code §1-617.04(a)(5) to schedule and conduct an individualized meeting with Unions for impact and effects bargaining and did not do so. Therefore, she concluded that DMH had committed an unfair labor practice. (R & R at pg. 22)

In response to DMH's claim that AFGE failed to properly request (or engage in[7]) impact bargaining on behalf of its members, the Hearing Examiner was not persuaded by DMH's assertion. Instead, the Hearing Examiner found that AFGE made several oral and written requests to bargain over the impact and effects of the changes, but was only offered the opportunity to "give input" or "consult" concerning the changes. Since the Hearing Examiner found that a request was made, but no opportunity to bargain was provided, she found that DMH committed an unfair labor practice by violating its duty to bargain in good faith pursuant to the CMPA.

No exceptions were filed concerning the Hearing Examiner's finding that an unfair labor practice was committed. However, the Union filed limited exceptions seeking to have the Hearing Examiner's remedy modified to include *status quo ante relief,* which the Union had originally requested.

Based on the foregoing, the Board finds that the Hearing Examiner's findings are reasonable, supported by the record, and consistent with Board precedent. The Board's precedent is clear that an Agency has the duty to bargain over the impact and effects of a management rights decision, where

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[6] As noted earlier, the Hearing Examiner found that an opportunity to "consult" or "give input" is *not* sufficient for the Agency to meet its bargaining obligation pursuant to Board precedent See, Fraternal Order of Police/DOC Labor Committee v. Department of Corrections, 49 DCR 8937, Slip Op. No. 679, PERB Case Nos.00-U-36 and 40 (2002). It is also well established that the duty to bargain in good faith is not satisfied by the agency "requesting input" from the union or "simply discussing" the impact and effect. See, Id.

[7] On one occasion, the record reflects that DMH's Human Resources Director invited the Union's representative to meet and discuss the changes at a time that was not convenient for the Union representative. Therefore, the representative did not attend. The invitation was to "meet and discuss," however, not to bargain.

there is a request to do so. See, International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 41 DCR 2321 Slip Op. No. 312, PERB Case No. 91-U-06 (1992), *aff'd sub nom.*, District of Columbia General Hospital v. Public Employee Relations Board and International Brotherhood of Police Officers, Local 446, MPA 92-12 (1993). We find that the record supports the Hearing Examiner's conclusion that a request to bargain was made and the Agency did not engage in impact bargaining with AFGE. As a result, we adopt the Hearing Examiner's factual findings and ultimate determination that DMH committed an unfair labor practice in violation of the CMPA.

IX. Remedy

The Hearing Examiner found that the appropriate remedy would include: (1) posting a Notice describing the ULP; (2)ordering that the parties engage in impact bargaining on an expedited basis, *"to the extent that any impact can be ameliorated"*; and (3) awarding costs. (R & R at pg. 31)

As noted earlier, the Union filed limited exceptions seeking to have the Hearing Examiner's remedy modified to include *status quo ante relief,* which the Union had originally requested.

When a violation is found, the Board's order is intended to have therapeutic, as well as remedial effect. AFSCME Local 2401 and Neal v. D.C. Department of Human Services, 48 DCR 3207, Slip Op. No. 644 at pg. 10, and PERB Case No. 98-U-05 (2001); D.C. Code §§1-605.02(3) and 1-617.13 (a) (2001 ed.). Moreover, the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations. Id. As a result, we believe that the Hearing Examiner's suggested relief is appropriate.

The Board has held that *status quo ante* relief is generally inappropriate to redress a refusal to bargain over impact and effects. FOP/MPDLC v. MPD, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). Furthermore, the Board has determined that *status quo ante* relief is *not* appropriate when: (1) the rescission of the management decision would disrupt or impair the Agency's operations; and (2) there is no evidence that the results of such bargaining would negate a management rights decision. Id.

In view of the above, we conclude that *status quo ante* relief is *not* appropriate in the present case. Specifically, we believe that returning the employees to the position they were in before the changes would be disruptive to DMH's operations. This is especially true in this case because the changes were made pursuant to law and mandatory regulations governing Mental Health facilities several years ago. Furthermore, we find *no* evidence that the results of further bargaining would negate DMH's decision to make the changes to work schedules and other policies noted in the record. As a result, the Board rejects the Complainant's Exceptions and request for *status quo ante* relief.

The Board has held that where there has been a significant passage of time after an Agency has implemented its changes without bargaining, impact and effects bargaining should be limited to only those subjects that are still *ripe*. See, International Brotherhood of Police Officers v. D.C. Office of Property Management, ___ DCR ___, Slip Op. No. 704, PERB Case No. 01-U-03 (2003).

Therefore, we adopt the Hearing Examiner's finding that bargaining should be limited to those issues that are not deemed *moot* by the passage of time.[8] Therefore, we order the parties to bargain over those issues that are not moot.

With respect to reasonable costs, the Board has ruled that an award of costs must be in the interest of justice. The Board has awarded costs when it determines that: (1) the losing party's claim or position was wholly without merit, (2) the successfully challenged action was undertaken in bad faith and (3) a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative. See, AFSCME, District Council 20, Local 2776 v. D.C. Department of Finance and Revenue, PERB Case No. 89-U-02, Slip Op. No. 245. The Hearing Examiner did not provide a detailed explanation for why costs should be awarded in her decision. However, in this case, we believe that the losing party's position was wholly without merit. The record is clear that the Agency invited the Union to meet and discuss the issues in dispute, not to bargain. As noted earlier, the Board's precedent is clear that meeting to give input and discussing is not tantamount to bargaining over the impact and effects of an issue. See, International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992); See also, Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). See also, Fraternal Order of Police/DOC Labor Committee v. Department of Corrections, 49 DCR 8937, Slip Op. No. 679, PERB Case No. 00-U-36 and 40 (2002). As a result, we find that the Board's standard for awarding costs has been met. Therefore, we concur with the Hearing Examiner's finding that the costs should be awarded in this case.

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[8]The Hearing Examiner's Report did not provide an explanation for what was meant by "bargaining should be limited to those issues where the impact can be ameliorated." (R & R at pg. 31. However, we find that the Hearing Examiner's decision could be interpreted as ordering bargaining only on those issues that are *ripe* for impact bargaining. Stated another way, the Hearing Examiner is recommending that the Board direct the parties to negotiate over issues that have not been deemed *moot* by the passage of time. This interpretation is consistent with our holding in International Brotherhood of Police Officers v. D.C. Office of Property Management, ___ DCR ___, Slip Op. No. 704, PERB Case No. 01-U-03 (2003). Therefore, we believe that the Hearing Examiner's recommended remedy is reasonable and consistent with Board precedent.

Pursuant to D.C. Code §1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. The Board hereby adopts the Hearing Examiner's findings and conclusion that DMH violated D.C. Code §1-617.04(a)(1) and(5) by failing to bargain over the impact and effects of changes to employees' working conditions after AFGE made a request to bargain. In addition, we find that the Hearing Examiner's recommended remedy will achieve the goals for awarding remedies, as outlined in the CMPA and the relevant Board precedent. As a result, we adopt the Hearing Examiner's recommended relief, including an Order directing DMH to reimburse the Complainant for reasonable costs.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Mental Health(DMH), its agents and representatives, shall cease and desist from violating D.C. Code §1-617.04(a)(1) and (5) (2001 ed.), by failing to bargain, upon request, over the impact and effects of changes to employees' hours of work, shift schedules, and policies concerning use of personal vehicles to perform work related duties .

2. DMH and the American Federation of Government Employees, Local 383 (AFGE) shall within thirty (30) days of the issuance of this Opinion, commence bargaining over the impact and effects of any issues that are still *ripe* or relevant to DMH's decision to make changes to employees hours of work, shift schedules, and policies concerning use of personal vehicles.

3. DMH shall post conspicuously within ten (10) days from the service of this Decision and Order the attached Notice. The Notice shall be posted where notices to employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.

4. DMH shall notify the Public Employee Relations Board (PERB), in writing, within fourteen (14) days from the date of this Order that the Notice has been posted.

5. Within forty (40) days of the date of this Order, DMH shall notify the Public Employee Relations Board (PERB), in writing, of the steps that it has taken to comply with paragraph number 2 of this Order.

6. The Complainant shall submit to the PERB, within fourteen (14) days from the date of this Order, a statement of actual costs incurred processing this action. The statement of costs shall be filed together with supporting documentation. DMH may file a response to the statement of costs within fourteen (14) days from service of the statement upon it.

7. DMH shall pay AFGE reasonable costs incurred in this proceeding within ten (10) days from the determination by the Board or its designee as to the amount of those reasonable costs.

8. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

October 15, 2004.